

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2119

3
17
5

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2119

JAMES HEIMERLE,

Petitioner-Appellee,

—v.—

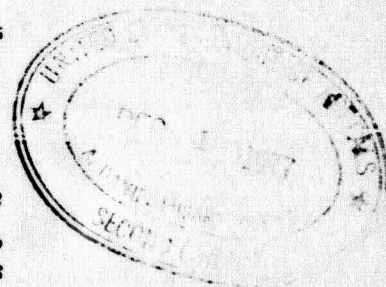
UNITED STATES OF AMERICA,

Respondent-Appellan'

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*



PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	PAGE
Indictment 72 Cr. 1330	A-1
Writ of Habeas Corpus 4-30-73	A-8
Heimerle Motion 12-17-76	A-11
Government's Reply Affidavit 1-17-77	A-33
Government's Memorandum of Law 1-17-77	A-34
Heimerle Reply Affidavit 1-25-77	A-44
Opinion of Judge Robert L. Carter 3-2-77	A-49
Heimerle Motion to Reconsider 3-15-77	A-54
Opinion of Judge Robert L. Carter 6-22-77	A-57
Government's Affidavit in Support of Motion to Reconsider 6-22-77	A-60
Government's Memorandum of Law in Support of Motion to Reconsider 6-22-77	A-62
Order and Endorsement of Judge Robert L. Carter 7-28-77	A-90
Brief and Appendix of United States of America in <i>Edwards v. United States</i>	A-91

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

VINCENT RIZZO --
MATTEO DiLORENZO --
SAM SALLI
JAMES HEIMERLE
JOSEPH CALISE
WILLIAM MIZONO,

Defendants

72 CRL 1 330

73 - 6377

INDICTMENT
72 Cr.

RECEIVED

11 1974

CLERK OF THE CLERK
SUPREME COURT, U.S.

DEC 6 1977

S. D. 25-14

COUNT ONE

The Grand Jury charges:

1. In or about April and May 1972, in the Southern District of New York and elsewhere VINCENT RIZZO, MATTEO DILORENZO, SAM SALLI, JAMES HEIMERLE, JOSEPH CALISE and WILLIAM MIZONO, the defendants, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree, together and with each other and with diverse other persons to the Grand Jury as yet unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 472, 473.

2. It was part of the conspiracy that the defendants with intent to defraud, would pass, utter, publish, sell and attempt to pass, utter, publish and sell, and keep in their possession and conceal, falsely made, forged, counterfeited and altered obligations and securities of the United States, to wit, counterfeit Federal Reserve Notes in the denominations of fifty and one hundred dollars.

3. It was further part of the conspiracy that the defendants would buy, sell, exchange, transfer, receive and deliver falsely made forged, counterfeited and altered, public debt and securities of the United States, to wit, commercial Federal Reserve Notes in the denominations of fifty and one hundred dollars, with the intent that the same be passed, published and used as true and genuine.

4. Among the means whereby the defendants carried out the conspiracy were the following:

a. SAM SALLI would communicate with persons unknown to purchase \$600,000 in counterfeit fifty and one hundred dollar bills for sale to MATTEO DILORENZO and VINCENT RIZZO.

b. MATTEO DILORENZO, VINCENT RIZZO and SAM SALLI would communicate with each other concerning negotiations relating to said purchase.

c. VINCENT RIZZO would arrange with JAMES HEIMERLE, WILLIAM MIZONO and JOSEPH CALISE to sell \$300,000 of said counterfeit bills to buyers who would distribute them in Japan.

d. VINCENT RIZZO would obtain sample counterfeit fifty and one hundred dollar bills from SAM SALLI, and would cause them to be delivered to WILLIAM MIZONO and JOSEPH CALISE in San Francisco, California.

e. WILLIAM MIZONO and JOSEPH CALISE would cause said samples to be shown to prospective Japanese buyers in California.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants committed and caused to be committed in the Southern District of New York and elsewhere the following overt acts among others:

1. On or about April 6, 1972, VINCENT RIZZO telephoned SAM SALLI.

2. On or about April 19, 1972, SAM SALLI telephoned MATTEO DILORENZO.

3. On or about April 14, 1972, JAMES HEIMERLE telephoned JOSEPH CALISE.

4. On or about April 19, 1972, JAMES HEIMERLE telephoned WILLIAM MIZONO.

5. On or about April 18, 1972, JOSEPH CALISE telephoned JAMES HEIMERLE.

6. On or about April 26, 1972, JAMES HEIMERLE telephoned JOSEPH CALISE.

7. On or about May 2, 1972, VINCENT RIZZO sent counterfeit fifty and one hundred dollar Federal Reserve Notes to JAMES HEIMERLE.

8. On or about May 3, 1972, JAMES HEIMERLE sent counterfeit fifty and one hundred dollar Federal Reserve Notes to JOSEPH CALISE.

(Title 18, United States Code, Section 371)

COUNT TWO

The Grand Jury further charges:

In or about May 1972, in the Southern District of New York, VINCENT RIZZO, MATTEO DILORENZO, SAM SALLI, JAMES HEIMERLE, JOSEPH CALISE and WILLIAM MIZONO, the defendants unlawfully, willfully and knowingly, and with intent to defraud, did pass, utter, publish and sell, and attempt to pass, utter, publish and sell, and did keep in their possession and conceal, falsely made, forged, counterfeited and altered obligations of the United States, to wit, counterfeited fifty and one hundred dollar Federal Reserve Notes.

(Title 18, United States Code, Sections 472 and 2)

COUNT THREE

The Grand Jury further charges:

In or about May 1972, in the Southern District of New York, VINCENT RIZZO, MATTEO DILORENZO, SAM SALLI, JAMES HEIMERLE, JOSEPH CALISE and WILLIAM MIZONO, the defendants, unlawfully, willfully and knowingly did buy, sell, exchange, transfer, receive and deliver falsely made, forged, counterfeited and altered obligations of the United States, to wit, counterfeited fifty and one hundred dollar Federal Reserve Notes, with the intent that the same be passed, published and used as true and genuine.

(Title 18, United States Code, Sections 473 and 2)

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York

Frank H. ...
FRANK H. ...

A 4

Atty. Present Herbert Yanowitz
June 18, 1973 Deft. William Mazon. It is adjudged
that the Deft. is hereby committed to the custody
of the Atty. Gen. or his Authorized Representative
or imprisonment for a period of three (3) years.
Execution of prison sentence suspended. Defendant
placed on supervised probation for a period of three
years. Deft. is fined \$5,000.00. A committed
fine. Fine to be paid on or before September 18, 1973.
The Court requested Periodic Probation reports
(quarterly)

Atty. Present Stanley Arkin. Carter, J.
June 25, 1973 Deft. Sam Salli Sentenced to two (2) yrs
on each of Cts. 1 & 2 to run concurrently.
Present bail condition continued - pending appeal.

Carter, J.
(Ru)

June 22, 1977 Pursuant to the opinion filed
on June 22, 1977 under 76 Civil 4217 and 76
Civil 5669 this indictment is dismissed

Carter, J.
J

JUNE 18, 1973

Atty. Present Robert Mitchell

Defendant Vincent Rizzo Sentenced To Three (3) years on Counts 1 + 2 to run concurrently with each other and concurrently with the sentence the deft. presently serving. Defendant is Fined \$5,000.00 on Ct. 1. The Deft. is demanded. Present bail condition continues pending appeal. The Deft. advised of his right to Appeal. Defendant Remanded Carter, J.

Atty. Present David M. Markowitz

Deft. Matteo Di Lorenzo sentenced to one (1) year on Ct. 1, and fined \$10,000.00. If the fine is not paid as directed, the deft. is to be committed until the fine is paid, or he is otherwise discharged according to law. The deft. advised of his right to Appeal. Carter, J.

Atty. Present Joseph Fontana

Deft. James ^{Altimieri} ~~Altimieri~~ sentenced one (1) year on each of Counts 1 + 2 to run concurrently with each other. Sentence to commence upon his release from confinement under State sentence. deft. is presently serving at New York State Penitentiary, Dannhauser, New York. Defendant is Fined \$1,500.00 on Ct. 2 only. If the fine is not paid as directed, the deft. is to be committed or he is otherwise discharged according to law. deft. advised of his right to appeal. Carter, J.

Atty. Present Edward A. Panzarella

Deft. Joseph Calise sentenced to three (3) years on Ct. 1. Pursuant to Title 18, U.S. Code, Section 3651, on completion of the term of sentence in a jail type institution, supervision of remainder of sentence is suspended. Probation supervised for one half year to begin at the end of the full sentence. Fined \$1,000.00. Unmet fine. Suspension of sentence on Ct. 2 is suspended and request for probation reports (quarterly) and home vision continues pending appeal. The deft. advised of his right to Appeal. Carter, J.

UTAH TONAR

May 10 1973 ... produced on writ ~~for~~
 Dept. carries reading indictment - Dept. pleads not guilty
 to both indictments. motions returnable on or before
 February 1, 1973. Indictment 72 Cr 1331 ~~unrel.~~
 Carter, J.

May 6 1973 Conference held for setting trial date. Trial to
 begin May 2, 1973 at 10 AM

Carter, J.

- MAY 2 - 1973 Hearing **Began** as to all Defendants.
 Defendant James Heimerle produced on writ.
 MAY 3 - 1973 Hearing continued & concluded. Decision Reser
 MAY 3 - 1973 jury trial began as to all Defendants. before
 MAY 4 - 1973 continued.
 MAY 7 - 1973 Trial continued.
 MAY 8 - 1973 Trial continued.
 MAY 9 - 1973 Trial continued.
 MAY 10 1973 Trial continued
 MAY 11 1973 Trial continued + Concluded.

Jury verdict as follows:

Jury finds Defendant Vincent Riggo guilty on Ct 1
 not guilty on Count #3.

Def. Matteo Di Lorenzo guilty on Ct #1 + not guilty
 Counts 2 + 3.

Def. Sam Solli guilty on Counts 1 + 2 + not guilty
 Count #3.

Def. James Heimerle guilty on Counts 1 + 2 + not
 guilty on Count #3.

Def. Joseph Calise guilty on Counts 1 + 2 + not
 guilty on Count #3.

Def. William Trizone guilty on Ct #1 only + not
 guilty on Counts 2 + 3. Jury polled as to all 6

Def. ... continued

Defendant ... ordered as to all Defendants

Defendant ... not guilty on Counts 2 + 3. Jury polled as to all 6

Defendant ... continued

7-11-1972
Form No. USA-22-774 (Ed. 9-23-58)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

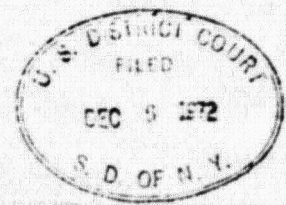
THE UNITED STATES OF AMERICA

vs.

VINCENT RIZZO,
MATTEO DILORENZO,
SAM SALLI,
JAMES HEIMERLE,
JOSEPH CALISE,
WILLIAM MIZONO,

Defendants

INDICTMENT



A TRUE BILL

United States Attorney

Foreman

A 7

12/

14/

DEC

Dec

DEC 6 1972

W/2 ordered as to sit
11/23/72 - indictment ordered sealed
Holley, J.

12/7/72 Indictment ordered sealed. -
Holley, J.

12/7/72 M. D. Lorenzo - (Atty David M. Marowitz present)
pleads not guilty. Ordered photographed &
fingerprinted. Bail fixed in the amount of
\$50,000. Remanded in lieu of bail. Atty. Gen.
Holley, J.

DEC 10 1972

Deft (Migono) pleads not guilty (Atty present)
Bail continued \$25,000
Motion 10 days
Deft Calles pleads not guilty
Holley, J.

Dec 20 1972 Deft Vincent Rizzo. Atty.
Bail fixed in the amount of \$25,000.
(on from Indictment) M. D. Lorenzo
(Atty. Gen. produced on indictment) M. D. Lorenzo

Ed. 3/23/57

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: ^{WARRANT} Superintendent, Ossining Correction Facility
Ossining, New York ^{GREENWICH PRISON}

and United States Marshal
Southern District of New York,

GREETING: 72 Cr. 1330

YOU ARE HEREBY COMMANDED to have the body of
JAMES HEIMERLE now detained in the

under your custody as it is said, under safe and secure
conduct before the Judges of our District Court within
and for the Southern District of New York, at the United
States Court House, Foley Square, New York, New York, on
May 2, 1973 at 9:30 ~~10:00~~ o'clock in the fore-
noon, there to appear and answer charges contained in
indictment number 72 Cr. 1330
and immediately after the said JAMES HEIMERLE
shall have been discharged or convicted and sentenced on
said indictment, that you return him to the said
Ossining Correction Facility
under safe and secure conduct, and have you then and
there this writ.

WITNESS the Honorable Sylvester J. Ryan.
Judge of the United States District Court for the Southern
District of New York, at the United States Court House,
Foley Square, New York, N.Y., this 30th day of April, 1973

James E. Anderson
Clerk, United States District Court
Southern District of New York 83

The within writ is hereby served.

Sylvester J. Ryan
United States District Judge

19

FILED
U.S. DISTRICT COURT
JUN 23 3 14 PM '73
S.D.N.Y.

SATISFIED
Rm C Carter.

17R

7/6/73 Received said individual on 7/6/73 and
delivered said individual to Greenhouse Co
paid on same day

Thomas E. Ferrandese
US Marshal
Point of Duffry
2/15/73 Marshal

EXECUTE ORDER BY ARRESTING THE U.S. MARSHAL, JAMES H. HARRIS
AT SAMPSON INSTITUTIONS STOPPING IN NEW YORK ON THE 2 DAY OF
MAY 1973, AND TRANSPORTING HIM TO 40 FIFTH AVENUE NEW YORK
CITY, FEDERAL COURT ON THE SAME DAY.

THOMAS E. FORDMOSCH
U.S. MARSHAL S.D.N.Y.

By *Richard Korman*
U.S. Deputy Marshal

5-2-73

Rachel Carter

MAY 11 1973
WRIT ADJOURNED TO MAY 18, 1973
[Signature]

MAY 2 1973

5-4-73

Rachel Carter

5/8/73

Rachel Carter

MAY 4 1973

5-7-73

Rachel Carter

Rachel Carter

MAY 1 1973

WRIT ADJOURNED TO 6/18/73
Charles L. Bryant Jr

MAY 9 - 1973

WRIT ADJOURNED TO 5-10-73
10:30 AM.

Rachel Carter

U.S. D.J.

MAY 10 1973

WRIT ADJOURNED TO 5-11-73
10: AM.

Rachel Carter

U.S. D.J.

UNITED STATES OF AMERICA

-v-

I please take notice that a
the within is copy of this day
ered in the within the action
ice of the Clerk of this Court.

19

Yours, etc.,

United States Attorney,
Attorney for

Attorney for

to certify that the within
presented for settlement and signa-
the Honorable
Office of the clerk,

City of
rk, on the day of
at o'clock in the
noon.
on thereafter as counsel can be

19

To you, etc.,

United States Attorney,
Attorney for

Attorney for

Due service of a copy of the within is
hereby admitted.
New York,

19

Attorney for

Attorney for

Form No. USA-33-575
(Rev. 1-30-60)

JAMES F. HURLEY,
Petitioner

-against-

NOTICE OF MOTION

UNITED STATES OF AMERICA,
Respondent

IND. 72 CR. 1330 - RIC

PLEASE TAKE NOTICE that upon the annexed affidavit of JAMES F. HURLEY, and upon all papers and proceedings herein contained, petitioner will move this honorable Court at a term thereof to be held in and for the United States District Court for the Southern District of New York, at 10:00 A.M. in the forenoon, or as soon hereafter as he may be heard, on December 28, 1976, pursuant to 28 U.S.C. 2255, for an Order directing the respondent to show cause why sentence should not be vacated and the indictment dismissed with prejudice as regards the above indictment number on the grounds that the respondent did violate petitioner's rights under the 5th, 6th and 14th Amendments to the Constitution; Title IV of the Interstate Agreement on Detainers and the interpretation thereof set forth by the United States Court of Appeals for the Second Circuit in U.S. v. Mauro, (Dkt. 76-1251, 1252, 10/26/76); and for such other and further relief as to this court may seem just and proper.

Yours, & etc.


JAMES F. HURLEY
150 Park Row

DATED: December 17, 1976

T: Pro Se Clerk
U.S. District Court - S.D.N.Y.

Hon. Robt. Nishe
U.S. Court House - Foley Square

IN SENATE,
Petitioner

-against-

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent

FILED IN THE
TO THE CLERK OF THE COURT
28 U.S.C. #2255

IND. 72 CR 1330 - 413

STATE OF NEW YORK)

COUNTY OF NEW YORK)

JAMES EARL RAY, Petitioner, deposes and says:

1. I am the petitioner above named and make this affidavit in support of the instant motion to vacate sentence pursuant to 28 U.S.C. #2255.
2. Petitioner is currently confined at the Metropolitan Correctional Center in New York City.
3. Judgment of conviction in the instant matter was rendered June 18, 1972 by the Hon. Robert Carter in the United States District Court for the Southern District of New York after conviction by a jury upon counts one and two of the above indictment, by virtue of which petitioner was sentenced to a term of one year's imprisonment to run concurrently with each other and consecutive to a New York State sentence then being served by the petitioner. A convicted fine of \$1,500 was imposed, which fine was paid by petitioner. Term of imprisonment was subsequently reduced upon petitioner's request to a term of imprisonment of six months and one day.
4. Judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit (U.S. v. Ray et al., 492 F. 2d 443).
5. Relief is sought because of respondent's violation of the Interstate Agreement on Detainers in that petitioner, while a New York State prisoner, was produced for trial on this matter by United States Marshal ad pro tempore and returned to New York State custody without final adjudication in the case at bar having been made.
6. Jurisdiction is based upon the fact that, but, the United States; the Interstate Agreement on Detainers, Art. IV; U.S. v. Ray (3rd Cir., Oct. 25, 1972, 10/25/72; U.S. v. Ray, et al., 492 F. 2d 443).
7. No previous judgment of conviction has been entered on the grounds alleged herein has been made in the instant matter.
8. No court or person has the law at this time has the authority to order the release of the petitioner.

FACTS

On December 6, 1972, petitioner and other co-defendants were indicted on 72 CR 1330.

At that time petitioner was incarcerated at the Queens House of Detention in New Gardens, New York awaiting sentencing on an unrelated New York State case.

Sentencing in the New York State case was scheduled for December 13, 1972.

On December 13, 1972 petitioner was sentenced in the New York State matter to a term of imprisonment of four (4) years. On December 18, 1972 one of petitioner's co-defendants, William Masono, was arraigned on the instant indictment (c.f. docket sheet, annexed as Exhibit A). Petitioner, however, was not arraigned at this time. On December 21, 1972 petitioner was removed to Ossining Correctional Facility to commence service of his recently imposed New York State sentence. At that time he still had not been arraigned on 72 CR 1330 in Federal court.

On January 18, 1973 petitioner was produced to plead on this indictment pursuant to a writ of habeas corpus ad prosequendum (Exhibit A, p. 2). Subsequently petitioner was returned to Ossining Correctional Facility from whence he was once again produced by writ of this court on May 2, 1973. Trial commenced on the following day. During this period, from December until July, 1973 petitioner was continually brought from Ossining Correctional Facility by a succession of writs ad prosequendum (the entire history is detailed in petitioner's moving papers, annexed as Exhibit B, in Heimerl v. U.S., supra. and the memorandum and order of Judge Bryant therein, annexed as Exhibit C).

Petitioner submits that production from New York State via writ ad prosequendum while petitioner was serving a state sentence required that all proceedings upon the instant indictment be concluded before his return to state custody and that since such proceedings were not concluded the teachings of Kiure and Heimerl (supra.) in this regard are controlling requiring vacation of sentence and dismissal of all charges in the instant matter.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

U. S. Form No. 100 Rev.

JUDGE CARTER

72 CRIM. 1330

TITLE OF CASE

THE UNITED STATES

ATTORNEYS

For U.S. Special AUSA
William I. Aronwald (264-3930)

- 1) VINCENT RIZZO
- 2) MATTEO DI LORENZO
- 3) SAM SALLI
- 4) JAMES HEIMERLE
- 5) JOSEPH CALISE
- 6) WILLIAM MIZONO

For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	12/1/72	Markowitz	✓	✓
J.S. 3 mailed	Marshal	12/1/72	Markowitz	✓	✓
Violation	Docket fee	12/1/72	Calise	✓	✓
Title 18	V. RIZZO-Fined \$5,000.	12/1/72	Markowitz	✓	✓
See 472 and 2 uttering	M. DI LORENZO-Fined \$10,000.	12/1/72	Markowitz	✓	✓
counterfeit Fed. Res. Notes	J. CALISE-Fined \$1,000.	12/1/72	Markowitz	✓	✓
(ct. 2) - 473 and 2 dealing	W. Mizono-Fined \$5,000.	12/1/72	Markowitz	✓	✓
in counterfeit Fed. Res. Notes		12/1/72	Markowitz	✓	✓
(ct. 3) - 371 conspiracy to		12/1/72	Markowitz	✓	✓
do to (ct. 1) -- RUFF		12/1/72	Markowitz	✓	✓

DATE	PROCEEDINGS
12-6-72	Filed Indictment and ordered sealed. - T.M. to all debts. -- Motley, J. 4.6
12-7-72	Indictment ordered unsealed.
12-7-72	M. Di Lorenzo - Filed warrant for arrest with Marshals return - executed on 12-7-72
12-7-72	M. Di Lorenzo - pleads not guilty (David M. Markowitz of counsel) Deft. ordered fingerprinted and photographed. 10 days for motions. Bail fixed in the amount of \$50,000. Remanded in lieu of bail. -- Motley, J.
12-7-72	M. Di Lorenzo - Filed notice of appearance by David M. Markowitz, Esq. 661 Broadway, NYC (Phone 234-4260)
12-12-72	Di Lorenzo - Filed following papers from Magistrate, docket sheet, appearance bond.

12-15-72 Di LORENZO - Filed remand dated 12/1/72 released on bail 12-8-72

(over)

77 OF 1730

page 2

JUDGE CARTER

DATE

PROCEEDINGS

- 12-15-72 Deft. W. Mizono - pleads not guilty (Atty. present). Bail continued \$25,000.
Joseph Calise - Deft. pleads not guilty. MacMahon, J.
- 12-18-72 Mizono- Filed notice of appearance by Herbert Monte Levy, Esq.,
Madison Ave., New York, N.Y. (689)-2210/
- 12-20-72 Vincent Rizzo - Bail fixed in the amount of \$25,000.00 on each of four indictments.--
MacMahon, J.
- 12-29-72 Rizzo-Filed papers rec'd from Magistrate, docket sheet, appearance bond.
- 1-5-73 Calise- Filed affirmation and notice of motion for discovery and inspect
and for a bill of particulars.
- 1-5-73 Salli-Deft. produced on warrant (atty. present) Deft. arraigned pleads
not guilty. Bail fixed at \$2,500.00. Deft. ROR until 4 P.M. 1-5-73.
Carter, J.
- 1-5-73 *Heimerle-Filed affidavit of facts to grand jury 1/18/73*
- 1-8-73 Filed order extending bail limits of Vincent Rizzo to Eastern N.Y.-Bryan
(filed 72cr1329)
- 1-10-73 MIZONO- Filed aff. vt. and notice of motion for transfer and to compel election -
ret. 1-19-73
- 1-10-73 MIZONO- Filed aff. vt. and notice of motion for discovery and inspection - ret. 1-19-73
- 1-10-73 MIZONO- Filed aff. vt. and notice of motion for a bill of particulars - ret. 1-19-73
- 1-10-73 MIZONO- Filed aff. vt. and supplemental notice of motion for discovery & inspection -
ret. 1-19-73
- 1-8-73 *Rizzo-Filed affidavit of facts to grand jury return issued 12/19/72*
- 1-10-73 M. DiLORENZO)
V. RIZZO) Filed aff. vt. & notice of motion for bill of particulars & for discovery
S. SALLI) and inspection.... Ret. 1-19-73..
- 1-11-73 Salli-Filed papers rec'd from Magistrate, Docket sheet, appearance bond
the amount of \$2,500.
- 1-16-73 Mizono- Filed memorandum of law in support of motions for bill of partic
for severance and transfer, for election of charges, and for pre-
trial discovery.
- 1-19-73 Filed Government motion of conditions for trial.
- 1-23-73 Pan-Filed affidavit for writ of habeas corpus writ issued 1-25-73
- 1-30-73 Heimerle-Filed affidavit and notice of motion for dis
bill of particulars, and for enlargement of ti inspect

DATE	PROCEEDINGS
2-5-73	M. Di LORENZO - Filed order extending bail limits to include the Southern Dist. of Florida from 2-14-73 to 2-24-73....Carter, J.
2-28-73	Salli - Filed warrant for arrest executed 1-5-73.
3-16-73	WILLIAM MIZONO - Filed Opinion #39319..deft and other depts move for bills of part. granted in parts and denied in parts. The Govt is ordered to decide between substantive and conspiracy cts. it chooses to prosecute. No convincing argumen has been made to order a transfer of prosecution to San Francisco and serveran (Mailed notice)
*****1-18-73	Deft James Heimerle (atty present Edward A. Panzarella) produced on v. and arraigned, deft waives reading of indictment, deft pleads not guilty to both indictments, motions returnable on or before Feb. 1, 1973. Indictment 72 Cr 1331 unrelated Carter, J.
3-22-73	Filed Govt's notice of motion on deft Mizono's motion to compell election between the conspiracy and substantive counts in the indictment.
3-26-73	Conference held for setting trial date, Trial to begin May 2, 1973 at 10AM Carter, J.
4-5-73	MATTEO DI LORENZO - Filed afdvt. & notice of motion for an order suppressing evide Filed copy of Eavesdropping Warrant & afdvts..
4-4-73	Filed Governments supplemental memorandum of points and authority.
4-19-73	Mizono - Filed memo endorsed on Governments motion filed 3-22-73: ".....In absence of special circumstances brought to the court's attention at or before tr which indicate that prejudice to defendants is more likely than it now app the Government will be permitted to try the substantive and conspiracy counts simultaneously. The order of 3-15-73 is withdrawn to the extent that it conflicts with this decision. So ordered. - Carter, J. (m/n)
4-30-73	Heimerle - Filed Govt's affidavit for writ, ret 5-2-73.
5-2-73	J. HEIMERLE) filed affirmation & notice of motion to dismiss the indictment.... J. CALISE)

DATE	PROCEEDINGS
5-7-73	Calise-Filed affirmation in connection of the pending motion to suppress as evidence all conversations obtained as a result of the interception of wire communications.
5-7-73	Heimerle and Calise- Filed notice of motion for an order to suppress.
5-9-73	Rizzo-Filed CJA appointment of Robert Mitchell as counsel 51 Chambers. Ca
5-9-73	Rizzo-Filed affidavit of financial affidavit status.
5-2-73	Hearing begun as to all defendants, Heimerle produced on a writ. Deft. Rizzo in custody.
5-3-73	Hearing continued and concluded. Decison Reserved.
5-3-73	Jury trial begun before Carter, J. as to all defendants.
5-4-73	Trial continued.
5-7-73	Trial continued.
5-8-73	Trial continued.
5-9-73	Trial continued.
5-10-73	Trial continued.
5-11-73	Trial continued and concluded.
	Jury verdict as follows:
	Rizzo, Guilty on counts 1 and 2 Not Guilty on count 3.
	Di Lorenzo -Guilty on count 1 and Not Guilty on counts 2 and 3.
	Salli- Guilty on counts 1 and 2 and Not Guilty on count 3.
	Heimerle-Guilty on counts 1 and 2 not guilty on count 3.
	Calise- Guilty on counts 1 and 2 not guilty on count 3.
	Mizono- Guilty on count 1 and not guilty on counts 2 and 3.
	Pre-sentence investigations ordered as to all defendants. Defts's motions reserved until May 23, 1973. Sentencing as to all defendants except Salli June 15, 1973 at 10 A.M., Deft. Salli sentencing day June 25, 1973 at 11 A.M. room 1306. Present bail conditions continued.

Carter, J.

Filed Transcript of record of proceedings, dated 5/1/73
 Filed Transcript of record of proceedings, dated 5/1/73
 Filed Transcript of record of proceedings, dated 5/1/73
 Filed Transcript of record of proceedings, dated 5/1/73
 Filed Transcript of record of proceedings, dated 5/1/73

DATE

PROCEEDINGS

5-14-73 Filed the following papers received from the chambers of Carter, J.
Docketed memorandum of deft, William Mizono in support of motion to suppress evidence, dtd. 4/20/73.
Docketed deft's Mizono reply memorandum, dtd. 5/1/73.
Docketed Govt's memorandum in opposition, dtd. 4/26/73.
Docketed Govt's memorandum.
Docketed Mizono's memorandum of law Re (1) Govt. motion to compel voice exemplars and (2) Govt's motion for reargument of court order requiring election of counts, dtd. 4/5/73.
Docketed Deft. Mizono memorandum of law, 2/7/73.
Docketed Govt's memorandum of law, dtd. 4/5/73.
Docketed deft's Mizono answering memorandum of law re Govt's motion for reargument of court order requiring election of counts, 4/11/73.
Docketed Govt's memorandum of law, dtd. 1/22/73.
Docketed Deft. Mizono reply memorandum.
Deft. Salli's request to charge, dtd. 5/1/73.
Docketed deft. Salli's supplemental requests to charge.
Docketed deft. Salli's trial memorandum, 5/1/73.
Docketed Govt's request to charge, dtd. 5/10/73.
Docketed Deft's Salli motion to suppress, dtd. 5/1/73.
Docketed affidavit in opposition of motion to suppress.

PROCEEDINGS

- 5/21-73 J. CALISE) Filed notice of motion for an order setting aside the verdict of the
J. HEIMERLE) trial jury..and for a verdict of acquittal.....
- 5/24/73 Rizzo-Filed appointment of CJA court reporters for minutes. Carter, J.
- 5/24/73 Sal - Filed CJA appointment of Court reporters for minutes. Carter, J.
- 5/24/73 Salli- Mailed CJA 21 on Francis D. Murphy handwriting expert to the A.O. Cart
- 5/24/73 Salli- Filed appointment of Francis D. Murphy as handwriting expert 198 B'wayN
- 5/24-73 Filed Memorandum and order on defts Rizzo, DiLorenzo, Calise, Heimerle and Sal
motion to set aside the verdict of the Jury, "The Court reserved judgment
on that motion. After consideration, that motion as to each deft deft
is denied, including the deft Mizono. So Ordered Carter, J.
- 5/28-73 Rizzo-Mailed Copy I of the CJA appointed Court Reporters dtd 5-4-73 to
the A.O. for payment. Carter, J.
- 5/28-73 Salli-Mailed Copy I of the CJA Court Reporters appointed 5-4-73, to the A.O.
for payment. Carter, J.
- 5/28-73 Di Lorenzo-Filed notice of appeal to the USCA for the 2nd Circuit from
from judgment of the USDC entered 6-18-73. \$5. pd. (notices mailed to the
AUSA and deft.)
- 5/28-73 SAM SALLI-Filed CJA 23 ~~Attorney's~~ Financial affdvt.
- 5/28-73 VINCENT RIZZO-Filed memorandum in support of motion to set aside verdict.
- 5/28-73 SAM SALLI-Filed affdvt & notice of motion for a Judgmt of acquittal-Ref. 5-30-73 (rec'd 5-21-73)
- 5/28-73 SAM SALLI-Filed memorandum of law in support of motion for Judgmt of acquittal (rec'd 5-21-73)
- 5/28-73 WM. MIZONO-Filed motion for a new trial. (rec'd 5-22-73)
- 5/28-73 WM. MIZONO-Filed memorandum in support of motion for new trial (rec'd 5-22-73)
- 5/28-73 MATTEO DILORENZO-Filed memorandum in support of motion to set aside verdict. (
- 5/28-73 WM. MIZONO-Filed Gov't affdvt in opposition to motion for a new trial (rec'd 5-25-73)
- 5/28-73 MATTEO DILORENZO-Filed Gov't affdvt in opposition to motion for a new trial (rec'd 5-25-73)
- 5/28-73 SAM SALLI-Filed Gov't affdvt in opposition to motion to set aside verdict. (rec'd 5-25-73)
- 5/28-73 HEIMERLE, CALISE-Filed Gov't affdvt in opposition to motion to set aside verdict (rec'd 5-25-73)

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Carter, J.

DATE	PROCEEDINGS
6-18-73	VINCENT RIZZO - Filed Judgment (# 73, 551) (Atty. present, deft is committed imprisonment for a period of 5 YEARS on ct. 1 & 2 to run concurrently with each other and concurrently with the sentence the deft is presently serving. Deft is FINED \$5,000.00 on ct. 1. The deft is remanded. Present bail condition cont'd. Present bail condition - appeal. The deft advised of his right to appeal. Carter, J. Entered 6-25-73----
6-18-73	MATTEO DILIGENZO - Filed Judgment (# 73, 551) (Atty. present, deft is committed imprisonment for a period of ONE YEAR on ct. 1, and FINED \$10,000.00. If the fine is not paid as directed, the deft is to be committed until the fine is paid, or he is otherwise discharged according to law. Present bail condition cont'd pending appeal. The deft advised of his right to appeal. Carter, J. Entered 6-25-73----- /deft on a writ.
6-18-73	JAMES HEIMERLE - Filed Judgment (# 73, 551) (Atty. present, deft is committed ONE YEAR on each of ct. 1 & 2, to run concurrently with each other. Sentence commence upon his release from confinement under State sentence deft is presently serving at NEW York State Penitentiary, Greenhaven, New York. Deft FINED \$1,500.00 on ct. 1 only. If the fine is not paid as directed, the deft to be committed or he is otherwise discharged according to law. Deft advise his right to appeal. Carter, J. Entered 6-25-73----- -# 73, 551)
6-18-73	JOSEPH CALISE - Filed Judgment (Atty. present) deft is committed for imprisonment a period of THREE YEARS on ct. 1. Pursuant to Ti. 18, U.S. Code, Sec. 3651, on condition that he serve SIX MONTHS in a jail type institution, execution of remainder of sentence is suspended - Probation (supervised) TWO & ONE HALF to begin at the end of the jail sentence. FINED \$1,000.00, committed fine. Imposition of sentence on count 2 is suspended. Court requests periodic pr reports (quarterly). Present bail condition continued pending appeal. The d advised of his right to appeal. Carter, J. Entered 6-25-73-----
6-18-73	WILLIAM MIZONO - Filed Judgment (# 73, 551) (Atty. present, the deft is committed imprisonment for a period of THREE YEARS. Execution of prison sentence suspended. Deft is placed on supervised probation for a period of THREE YEARS. Deft is \$5,000.00 a committed fine. Fine to be paid on or before Sept. 18, 1973 - The Court requested periodic Probation reports (quarterly). Carter, J. Entered 6-25-73-----
6-25-73	SAM GALLI - Filed Judgment (Atty. present) deft is committed for imprisonment for a period of TWO YEARS on each of counts 1 & 2, to run concurrently. Present bail condition cont'd. pending appeal. Carter, J. Entered 6-26-73-----
6-25-73	CALISE - Filed Judgment (Atty. present) deft is committed for imprisonment for a period of TWO YEARS on each of counts 1 & 2, to run concurrently. Present bail condition cont'd. pending appeal. Carter, J. Entered 6-26-73-----
6-25-73	MIZONO - Filed notice of appeal to the USCA for the 2nd Circuit from judgment entered 6-18-73 (fine paid \$5,000.00) (Court committed deft to prison for 3 years on each of counts 1 & 2, to run concurrently with each other. Sentence commence upon his release from confinement under State sentence deft is presently serving at NEW York State Penitentiary, Greenhaven, New York. Deft FINED \$1,500.00 on ct. 1 only. If the fine is not paid as directed, the deft to be committed or he is otherwise discharged according to law. Deft advise his right to appeal. Carter, J. Entered 6-25-73-----

Copy made
6-28-73

DATE	PROCEEDINGS
6/28-73	Rizzo-Filed notice of appeal to the USCA for the 2nd Circuit from the judgment entered 6-18-73. (Leave to appeal in forma pauperis is hereby granted. Carter, J. (mailed copies to deft. and U.S. Atty.))
7-5-73	Di Lorenzo-Filed order signed by Judge Carter, dtd. 7-3-73, extending bail limits.
6/28-73	Salli-Filed appointment of Counsel under CJA Stanley Arkin 300 Madison Ave. N.Y.C. Carter, J.
7/2-73	Salli-Filed appointment of Court reporters under CJA. Carter, J.
7/13-73	Salli-Filed appointment of CJA dtd. 3-28-73 appointing Stanley S. Arkin as counsel 300 Madison Ave. Carter, J.
7/13-73	Salli-Mailed Copy 1 of the CJA to the A.O. for payment. Carter, J.
7/18-73	Salli-Filed affidavit and notice of motion for an order vacating the judgment and conviction.
7/18-73	Filed Transcript of record of proceedings, dated May 2, 3-1973
7/18-73	Filed Transcript of record of proceedings, dated June 25, 1973
7/19-73	Salli-Filed memo endorsed on motion dtd. 7-18-73, This motion previously denied in open court. Carter, J.
7/28-73	JAMES HEIMERLE. Filed WRIT OF HABEAS CORPUS AD PROSEQUENDUM & allowed by Judge Ryan.
7/22-73	VINCENT RILEY. Filed Commitment & entered return. Deft. Delivered to the Detention Hqtrs NYC
7/22-73	FRANK CALABRO. Filed Commitment & entered return. Deft. Delivered to the Detention Hqtrs NYC
7/31-73	Salli- Filed deft's reply affidavit.
7/31-73	SAM SALLI. Filed REPLY AFFIDAVIT by Stanley S. Arkin, attorney for the petitioner.
8/4-73	ALL DEFENDANTS. Filed NOTICE TO THE DOCKET CLERK: record on appeal has been certified and transmitted to U.S.C.A., Second Circuit, on this date.
8/1-73	Salli-Filed memo endorsed on motion dtd. 7-18-73, Motion denied. Carter, J.
8/3-73	Salli-Filed Govt's memorandum of law.
8/4-73	Salli-Filed Govt's affidavit by Edward Shaw.
9/1-73	Sam Salli-Filed notice of appeal to the USCA for the 2nd Circuit from an order from the USDC for SDNY, rendered on the 1 day of Sept. 1973 by the Hon. Robert L. Carter, denying deft's motion made pursuant to 28 U.S.C. 2255 for an order vacating the judgment of conviction entered against him. (copies mailed to US, Atty. and deft's atty.) 9-11-73.

JUDGE CARTER

RM 1330

A 23
page #9

JUDGE CARTER

PROCEEDINGS

DATE

- 2-1-73 sky-Filed memo. endorsed on def't's motion for leave to appeal in forma pauperis. Application approved by Carter, J. (n/m)
- 9-17-73 ALL DEFENDANTS: Filed MOTION FOR MODIFICATION OF SENTENCE and an AFFIDAVIT (signed by William Mizono) from Herbert Monte Levy (295 Madison Ave., New York, N.Y. 10017. Telephone: (212) 689-2220) and Herbert W. Yanowitz (105 Montgomery Street, Suite 1100, San Francisco, Cal. 94104. Telephone: (415) 362-1365).
- 9-10-73 WILLIAM MIZONO: Fine marked satisfied and entered in money judgment book. (N)
- 9-21-73 James Heimerle-Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.
- 10-2-73 Rizzo, Di Lorenzo, Salli, Heimerle, Caise & Mizono-Filed notice that the supplemental record on appeal has been certified and transmitted, to the U.S.C.A.
- 10-2-73 Salli-Filed notice that the record on appeal from motion to vacate judgment has been certified and transmitted to the U.S.C.A.
- 10-5-73 Rizzo-Mailed copy 1 of the CJA 20 to the A.O. for payment. Carter, J.
10-12-73
- 10-12-73 Salli-Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.
- 10-10-73 VINCENT RIZZO: Filed Copy 5 of CJA 20 of APPOINTMENT (254989). Approved for payment by: (not indicated). Amount approved: (not indicated). Payee: Gilbert Epstein, 253 Broadway, New York, N.Y. 10007.
- 10-30-73 JAMES HEIMERLE: Filed Copy 5 of CJA 21 AUTHORIZATION for pre-trial transcript for purposes of appeal. Authorized by: Judge Carter. Approved for payment by: (not indicated). Amount approved: (not indicated). Payee: Southern District Court Reporters.
- 11-20-73 Heimerle-Filed and mailed copy 1 of the CJA 21 for authorization for court reporter to the A.O. Carter, J.
- 12-5-73 Filed Transcript of record of proceedings. June 18, 1973.
- 1-8-74 Filed Stip. designating re: exhibits to be transmitted to USCA
- Jan 2-74 Filed Supplemental record on appeal case transmitted to the U.S.C.A. (DILORRENZO)
- Jan 2-74 Filed order that the bail limits as prescribed in def't's bail bond be hereby extended to include Southern District of Fla. from 2/10/74 to 2/23/74 - Further order that the def't shall abide by and comply with the provisions of his bail bond and def't. shall not do

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72 CRIM 1330

PAGE #10

JUDGE CARTER

DATE	PROCEEDINGS
8-25-74	MATTEO DI LORENZO - Filed Notice of Motion and Affidavit returnable 5/3/74 at 10:00 A.M. for an order reducing sentence imposed etc.
5-2-74	Government. Matteo Di Lorenzo - Filed Affidavit in opposition to the motion by dist. for an order to reduce sentence, imposed
5-20-74	MATTEO DI LORENZO - Filed memo-endorsed on motion dtd. 4/25/74 -- Motion denied - Carter
5-24-74	FILED
5-24-74	FILED
5-6-74	MATTEO Di Lorenzo - Defendant surrendered for service of sentence.
5-6-74	SAM SALLI - Defendant surrendered for service of sentence.
Jul 10-74	MATTEO DiLORENZO - Fine marked satisfied and entered in money judgment book. Carter, J.
Jun 21-74	VINCENT RIZZO - Filed copy of order by Supreme Court of the US that on Petition for Writ of Certiorari the the US Court of Appeals for the Second Circuit. On Consideration of the petition for a writ of certiorari herein to the USCA for the Second Circuit, it is ordered by this court that the said petition be, and the same is hereby, denied. m/n
Jun 21-74	MATTEO DiLORENZO - Filed copy of order by Supreme Court of the US that on Petition for Writ of Certiorari is denied. m/n
Jun 21-74	SAM SALLI - Filed copy of order by Supreme Court of the US that on Petition for Writ of Certiorari is denied.
Sep. 16-74	MATTEO DI LORENZO - Filed Notice of Motion returnable 9/27/74 at 10AM as counsel can be heard for an order reducing the sentence imposed
Oct 3-74	SAM SALLI - Filed memo-endorsed on letter dtd 9/17/74 -- The motion is denied - So order Carter, J. (m/n)
10-9-74	DI LORENZO - Filed Affidavit of Barbara S. Ambler, in opposition to del motion.
10-9-74	DiLORENZO - Filed Memo dendorse re: above -- Motion denied - So order Carter, J. (m/n)
09-30-75	JAMES HEINERLE - Filed MEMORANDUM JUDGMENT--The deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment and the judgment of June 18, 1974 is amended as follows: The deft. is to serve ONE(1) YEAR and ONE(1) DAY on each of etc. 1 and 2 to run concurrently with each other. Sentence to commence at his release from confinement under State Statute. Delt. is liable \$1,500 on etc. 1 only. If the fine is not paid as directed, the deft. to be committed or he is otherwise discharged according to law. Carter, J. (copies issued)
4/7/75	Heinertle Filed commitment & amended return Del delivered 3/2/75

C-110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order of Judgment Not
4-30-75	HEIMERLE--Filed defts. letter dated April 21, 1975 for increase of sentence as indicated.	
5-02-75	HEIMERLE--Filed endorsement-- It It is in the expectation and on the condition that deft. will become eligible for earlier release as a result of this action that I grant his unusual request for an increase in each of his two concurrent federal sentences from one year to one year and one day. The judgment is ordered amended accordingly. So ordered, Carter, J. <i>(pro se for motion)</i>	
7-11-75	JAMES HEIMERLE--Filed defts. affdt. and notice of motion for correction of judgment.	
7-07-11-75	JAMES HEIMERLE--Filed memo end. on above motion--Motion Granted. Transcript reflects that sentence imposed in open court was one yr. imprisonment and fined \$1,500. The judgment is ordered amended accordingly to delete the following: "if the fine is not paid as directed, the deft. is to be committed or he is otherwise discharged according to law. So ordered, Carter, J. (to pro se for notices)"	
7-15-75	JAMES HEIMERLE--Filed AMENDED JUDGMENT# <u>75,344</u> the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for one year and 1 day on each of cts. 1 and two to run concurrently with each other. Sentence to commence upon his release from confinement under state xxx sentence. The deft. is fined \$1,500 on ct. 1. only. Carter, J. (copies issued)	
7/25/75	<i>Heimerle</i> ^{amended} Filed commitment & entered affdt. <i>affdt.</i> delivered to <i>by mail to Fed. Corr. Inst., Danbury, Conn. on 7/16/75.</i>	
08-11-75	Heimerle- Fine marked satisfied and entered in money judgment book.	
03-17-76	WILLIAM MIZONO--Filed Probation form 22 of Transfer of jurisdiction to the Northern District of California.	
6-11-76	WILLIAM MIZONA-- Filed acknowledgment of receipt of deft's record by No. Dist. of Calif. -San Jose (Their Cr.76-145)	

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKJOHN J. BROWN,
Petitioner

-against-

UNITED STATES OF AMERICA,
RespondentAFFIDAVIT IN SUPPORT OF MOTION
TO WRIT OF HABEAS CORPUS
28 U.S.C. 2255

FILED IN: 76-1011

JAMES J. BROWN

7 NEW YORK, N.Y.

JOHN J. BROWN, being duly sworn, deposes and says:

1. I am the petitioner above named and make this affidavit in support of the instant motion to writ of habeas corpus pursuant to 28 U.S.C. 2255.
2. Petitioner is currently confined at the Metropolitan Correctional Center.
3. Judgment of conviction in the instant matter was rendered on July 23, 1974 by the Hon. Charles Bryant in the United States District Court for the Southern District of New York upon petition for writ of habeas corpus to the 2nd Court of the above indictment, by virtue of which judgment petitioner was sentenced to a term of four years probation, said probation to commence upon expiration of confinement ordered by the Hon. Robt. Carter on June 16, 1973 in an unrelated matter.
4. No appeal was taken from said judgment of conviction.
5. Relief is sought because of the failure of the respondent to comply with Article IV of the Interstate Agreement on Detainers in that petitioner, while a State prisoner was produced for trial within the jurisdiction of the Court pursuant to writs of habeas corpus ad prosequendum on several occasions and on each occasion returned to State custody in violation of the Interstate Agreement on Detainers.
6. Jurisdiction is invoked under the 5th, 6th and 14th Amendments to the Constitution of the United States; the Interstate Agreement on Detainers, Article IV; U.S. v. Brown (Dist. Ct., S.D.N.Y., 76-1011, 76-1701, 10/16/76).
7. No previous application pursuant to 28 U.S.C. 2255 has been made in the instant matter, nor an application for the relief sought herein on the grounds herein alleged has been made.

76 CIV 5563
(CLB)

10. Appellant believes that there are substantial questions of fact and law which should be argued on this appeal.

11. Appellant's rights were violated insofar as the trial court permitted into evidence statements of a co-defendant.

12. The trial court went in and out of evidence extensive proof of similar acts as well as appellant's prior convictions.

13. The trial court kept in exerting continuous pressure upon the jury to arrive at a verdict despite the fact that the juror apprised the court that they were having great difficulty arriving at a verdict.

14. Appellant believes that the record on appeal will demonstrate that numerous errors of law were made by the trial court, however, absent the record appellant is unable to cite each and every instance of such error.

15. Despite the fact that appellant was represented at the time of trial by retained counsel (c.f. Exhibit B), appellant is now indigent and is unable to retain counsel on his own behalf.

WHEREFORE, appellant respectfully prays that an order enjoining him leave to appeal in forma pauperis, upon the original record, without costs or recovery therefor, and that counsel be assigned to prosecute this appeal, and for such other and further relief as to this court may seem just and proper.

Respectfully submitted,

[Signature]
Appellant, Pro Se
150 Park Ave.
New York, N.Y.

Corn to Before me this

day of December, 1976

Kane & Tracy
100 West 11th Street, New York, N.Y.

Attest: I, the undersigned, being duly sworn, depose and say that the appellant

above named and known, this day of December, 1976, deposited in a mail

postage paid for a first class copy of the above motion and notice thereof

directed to Hon. Wm. T. Riker, U.S. Court House, Foley Square.

Corn to Before me this

day of December, 1976

Kane & Tracy

[Signature]
Hon. Wm. T. Riker, Appellant, Pro Se

In Mauro, supra., the United States Court of Appeals affirmed the case of Ex parte Harkins, supra. Both Mauro and Ex parte Harkins, while involving New York cases, had been transferred on Federal charges, produced in Federal court via writ of habeas corpus, returned to State custody and again sent to Federal court for trial. The 2nd Circuit held that this procedure was not permissible and held that a writ of habeas corpus ad prosequendum "is a device entitling the state inmate to protection provided in Article IV (of the Interstate Agreement on Detainers)" (c.f. Mauro, supra., at 12). Further, the Mauro court concluded that a state inmate is categorically entitled to a trial before his return to a State institution having once been arrested into Federal jurisdiction via a writ of habeas corpus ad prosequendum (c.f. Mauro, at 6).

In view of the clear language of Article V (e) to follow the defendant and plainly designed to avoid the possibility of punishment back and forth in the event of recidivism....the pertinent provisions have...plainly warranted that such trials and judgments will take place before a court composed of disinterested and impartial persons, supra. at 8.

A copy of the document is being submitted as "Exhibit B".

W. J. W. W., petitioner respectfully prays that an Order be made granting vacation of sentence and dismissal of the instant indictment with prejudice and for such other and further relief as to this court may seem just and proper.

Verpes, Bill, submitted,

[Signature]
 JAMES W. W., 1010-73-130
 Petitioner, pro se
 150 Park Ave
 New York, N.Y.

Shorn to before me this
 2 day of December, 1976.

Karen E. Amey

Deputy Clerk

DECLARATION OF AFFIDAVIT

JAMES W. W., being duly sworn, deposes and says:

1. I am the petitioner above named.
2. I have this 2 day of December, 1976 deposited in a mailbox provided by the order of the Metropolitan Correctional Center copies of the above affidavit addressed as follows:

- A. Clerk of the Court
 U.S. District Court - Southern District
- B. Rolla Finkbe, Esq.
 U.S. Attorney
 U.S. Courthouse - Foley Square

[Signature]
 JAMES W. W., 1010-73-130

Shorn to before me this
 2 day of December, 1976

Karen E. Amey

Deputy Clerk
 10 ADMINISTRATIVE OFFICE (10) U.S. DIST. COURT

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE BYRNE:

72 APR 1968

D. C. Form No. 100 Rev.

TITLE OF CASE:

ATTORNEYS

THE UNITED STATES

For U. S.: Special AGSA

William I. Aronwald (264-3930)

1) JOSEPH CALISE

2) JAMES WEINER

For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	10/13	Clerk	✓	✓
J.S. 3 mailed / - 2	Marshal	10/13	Marshal	✓	✓
Violation	Docket fee				
Title 16					
Sec. 1341 and 2, using the mails in a scheme and artifice to defraud, (cts. 2 and 3) 371 conspiracy so to do.					
THREE CENTS					

THREE COUNTS

DATE	FILED	FILED BY
12-6-72	Filed indictment and ordered sealed - 174 as to all depts.	--- Motley, J.
12-7-72	Indictment ordered unsealed --	Motley, J.
12-18-72	CALISE - Dert. pleads not guilty.	-- MacMahon, J.
1-19-73	Filed Government's notice of readiness for trial.	
1-24-73	Heimerle-Filed notice of appearance by atty Edward A. Panzarrella. 32 Court St, Bklyn N.Y. 11201 MA 50095.	
2-1-73	Calise & Heimerle-Filed affidavit and notice of motion for an order for the U.S. Atty to furnish discovery and inspection, bill of particulars, suppression etc.	
3-5-73	Filed depts. memorandum of points and authorities.	
3-14-73	BOTHE DEPTS -Filed advt. of G.Hinckley, Special Atty. dtd.2-21-73...	

DATE	PROCEEDINGS
3-15-73	Filed govt's memorandum on points and authorities.
3-15-73	Filed Govt's memorandum of law.
3-14-73	Calise & Heimerle-Filed memorandum attached to motion dtd. 2-1-73 for Bill of particulars etc. Motion granted and denied as indicated in endorsement. Bricant, J.
3-19-73	Calise & Heimerle-Filed affidavit and order that the defts are to perform exemplars of their voices in the same manner and order as those of questioned exemplars germane to this cause., and the voices are to be performed at rm. 1307, 26 Federal Plaza 2:00 PM 3-23-73 Bricant, J.
3-19-73	HEIMERLE - <i>Def (att. present) pleads not guilty. Writ set aside. Bricant, J.</i>
3-19-73	Calise & Heimerle-Filed memo endorsed on motion for an order directing the defts to provide voice exemplars. Motion granted order signed Bricant, J.
3-27-73	J. HEIMERLE - Filed advt. of G.J. Hinckley, Special Atty. dtd. 3-22-73. for a Writ.
3-30-73	J. Heimerle-Filed notice that the debt declines to submit to any voice exemplar in violation of his constitutional rights.
3-30-73	J. Calise-Filed notice that the debt declines to submit to any voice exemplar in violation of his constitutional rights.
3-16-73	JAMES HEIMERLE-Filed Writ of Habeas Corpus with Marshal's return-Writ Satisfied 2-15-73.
4-10-73	Both defts.- Filed defendants memorandum of points and authority.
4-19-73	Heimerle-Filed writ of habeas corpus dated 3-23-73 with Marshal's return 3-20-73, writ satisfied Bricant, J. 3/27/73
5-21-73	Calise-Filed copy of acknowledgment of debt's constitutional rights.
5-18-73	Calise (att. present) withdraws his plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adjourned to 6/20/73. Bail continued.
	Heimerle- Trial adjourned to 9/24/73. Bricant, J.
6-14-73	<i>Transcript of record of proceedings, dated March 29, 1973.</i>
6-20-73	JOSEPH CALISE-Filed Judgment (Atty. present) debt committed for imprisonment for a period of FIVE YEARS on et al Pursuant to Sec. 3551 of Ti.18, U.S.C., as amended, with provisions debt be confined in a JAIL TYPE institution for a period of SIX MONTHS, as provided in the aforesaid Sec. Execution of the remainder of the sentence is suspended and debt is placed on probation for a period of 4 1/2 years, subject to the standing probation order of this Court and to commence upon expiration of confinement. This sentence is to run concurrently with the sentence imposed by Judge Carter in 72Cr.1330 insofar as it can. Sta-2 and 3 are dismissed on motion of debt's counsel with consent of the Govt. Debt is remanded..... Bricant, J.Entered 6-22-73.....
6-21-73	CALISE- Filed notice of appeal to the USA for the 2nd Circuit from judgment filed 6-20-73 (att. present, and US Atty)

a.1331

BRIEANT, J.

Page 3

PROCEEDINGS

DATE

7-23-73 JAMES HEIMERLE - Filed copy of indictment with marshals for Deft. delivered to Federal Detention Admin. Jan. 20-73.

8-2-73 Filed notice that record has been transmitted to U.S.C.A.

8-18-73 JAMES HEIMERLE - Filed Affidvt. for W/H/C Ad. Prob. Writ issued Ret. 9-24-73.

9-26-73 JAMES HEIMERLE - Filed notice of appearance by Gary R. Sunden, 401 B'Way., N.Y.C. 10013 925-4848.

10-26-73 JAMES HEIMERLE - Filed CJA form 20. Order appointing Gary Sunden, Esq. CJA 607 LAC as counsel.

3-5-74 JAMES HEIMERLE - Filed Affidvt. for W/H/C Ad. Prob. Writ issued and Ret. 3-8-74.

4-5-74 JAMES HEIMERLE - Filed W/H/C - Writ satisfied 4-5-74. TENNEY, J.

7-8-74 JAMES HEIMERLE - Filed Affidvt. for W/H/C Ad. Prob. Writ ret. 1/22/74.

7-22-74 JAMES HEIMERLE - Deft. (att'y present, Gary Sunden) produced in Court on Writ of Habeas Corpus Ad Prosequendum. Deft. withdrew previous plea of NOT GUILTY and now pleads GUILTY to Count 2 only. Writ adj'd until 7-23-74. -- BRIEANT, J.

7-23-74 JAMES HEIMERLE - Filed Judgment and Order of Probation. It is Adjudged that the imposition of sentence on Count 2 is suspended. Deft. is placed on probation for a period of FOUR (4) YEARS, subject to the standing probation order of this court. Deft's probation is to commence upon expiration of confinement imposed by Judge Carter on June 18, 1973 in 73 CR. 1330. Counts 1 and 3 are dismissed on motion of Deft's counsel with the consent of the Government. -- BRIEANT, J.

7-26-74 JAMES HEIMERLE - Filed Writ of Habeas Corpus directed to Marlen, Greenhaven Correctional Facility, Greenhaven, NY, with Marshall's return - Writ satisfied 7-23-74. -- BRIEANT, J.

8-2-74 JAMES HEIMERLE - Filed Writ of Habeas Corpus directed to Marlen, Greenhaven Correctional Facility, Greenhaven, NY, with Marshall's return - Writ satisfied 7-23-74. -- BRIEANT, J.

7-24-74 J. HEIMERLE - Mailed original CJA copy 1 to the A.O. Wash.D.C. for payment. -- BRIEANT, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JAMES HEIMERLE, :

Petitioner : AFFIDAVIT

-v- : 72 Cr. 1330

UNITED STATES OF AMERICA : (RLC)

Respondent. :

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

BARBARA S. AMBLER, being duly sworn, deposes and says:

1. I am a Special Attorney for the United States Department of Justice assigned to the Organized Crime (Strike Force) Unit of the office of the United States Attorney for the Southern District of New York. As such, I am familiar with the above-captioned matter.

2. I make this affidavit and the attached memorandum of law in opposition to petitioner Heimerle's motion, pursuant to Title 28, United States Code, Section 2255, to vacate his sentence and dismiss the indictment in 72 Cr. 1330.

3. For the reasons set forth in the Government's memorandum, the Government submits that Heimerle's motion is without merit and should be denied.

Barbara S. Ambler
BARBARA S. AMBLER
Special Attorney
United States Department of Justice

Subscribed and sworn to before me
this 17th day of January, 1977

Elizabeth A. Ambler

ELIZABETH A. AMBLER
Notary Public, State of New York
No. 4, 100, 912
Qualified in New York County
Commission Expires March 20, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JAMES HEIMERLE, :

Petitioner :

AFFIDAVIT

-v- :

72 Cr. 1330

UNITED STATES OF AMERICA :

(RLC)

Respondent. :

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

BARBARA S. AMBLER, being duly sworn, deposes and says:

1. I am a Special Attorney for the United States Department of Justice assigned to the Organized Crime (Strike Force) Unit of the office of the United States Attorney for the Southern District of New York. As such, I am familiar with the above-captioned matter.

2. I make this affidavit and the attached memorandum of law in opposition to petitioner Heimerle's motion, pursuant to Title 28, United States Code, Section 2255, to vacate his sentence and dismiss the indictment in 72 Cr. 1330.

3. For the reasons set forth in the Government's memorandum, the Government submits that Heimerle's motion is without merit and should be denied.

Barbara S. Ambler
BARBARA S. AMBLER
Special Attorney
United States Department of Justice

Subscribed and sworn to before me
this 17th day of January, 1977

Elizabeth A. McFadden

ELIZABETH A. MCFADDEN
Notary Public, State of New York
Exp. 01-01-82
Qualified in New York County
Commission Expires March 30, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----x
UNITED STATES OF AMERICA :

-v- :

72 Cr. 1330
(RLC)

JAMES HEIMERLE, :

Defendant. :

-----x

MEMORANDUM OF LAW

James Heimerle has moved in this criminal case, pursuant to 28 U.S.C. Section 2255, * for an order to vacate the sentence imposed upon him and to dismiss the Indictment upon which the sentence was premised. (72 Cr. 1330). He bases his application on the Interstate Agreement on Detainers Act, 18 U.S.C. Appendix (Pub.L. 91-538, Sections 1-8, Dec. 9, 1970) (the Act). The Government opposes defendant's application because he has failed to raise a claim cognizable under either Section 2255 or a petition for a writ of coram nobis. **

FACTS:

On December 6, 1972, James Heimerle, along with five other defendants, was indicted for counterfeiting and conspiracy in violation of Title 18, U.S.C. Sections 472, 473 and 371. At the time of this indictment, Heimerle was a prisoner in New York State custody awaiting sentence on an unrelated case. On December 13, 1972, he was sentenced in the state matter to a term of four years imprisonment. He commenced the service of this sentence on December 21, 1972, at Ossining Correctional facility.

FOOT NOTE

*Procedurally, since Heimerle has fully served the sentence he is now moving to vacate, his action should have been brought as a petition for coram nobis under the "All Writs" statute, 28 U.S.C. Sections 1651(a). Since Heimerle is proceeding pro se, however, and since Section 2255 and coram nobis are similar, the Government will deem this a petition for a writ of coram nobis, rather than object to defendant's application on this technical ground.

**The Government does not concede for a moment that the Act applies to the facts in Heimerle's case. To the contrary, we respectfully submit that the Mauro court erred in its holdings, on a similar fact pattern, that the Act is applicable to the United States as a "receiving state" and that the use of a writ of habeas corpus ad prosequendum is the same as a detainer and triggers the provisions of the Act without any affirmative action on the part of the prisoner. However, it is unnecessary to reargue Mauro to determine the instant motion since Heimerle's application under Section 2255 is clearly and significantly distinguishable from Mauro where the claimed violation of the Act was raised pre-trial. See United States v. Mauro, Dkt. No. 76-1251, slip op. (2d Cir., Oct. 26, 1976).

BSA:ih

On January 5, 1973, a writ of habeas corpus ad prosequendum was filed to produce Heimerle in the Southern District of New York for arraignment on 72 Cr. 1330. On January 18, 1973 he was produced, pursuant to this writ, before the Honorable Robert L. Carter and he pled not guilty to the indictment. After pleading, Heimerle was returned to State custody. On May 3, 1973, a second writ of habeas corpus ad prosequendum was issued in connection with this indictment, which caused Heimerle to be transported by the United States Marshal from Greenhaven County Jail, Stormville, back to the United States Courthouse Foley Square for trial on the indictment. On May 11, 1973 Heimerle was convicted of possession and conspiracy to possess and distribute counterfeit \$50 and \$100 bills, after a jury trial. On June 18, 1973, the Honorable Robert L. Carter sentenced him to two concurrent one year terms of imprisonment to commence upon the completion of his four year State prison sentence, and a \$1500 fine. Heimerle remained in federal custody continuously from May 3, 1973 to July 6, 1973, on which date he was delivered back into State custody at the Greenhaven County Jail.

Heimerle's application fails to state a claim cognizable either under 28 U.S.C. Section 2255 or in a petition for coram nobis.

"It is well settled that an indictment may not be collaterally attacked under Section 2255 except for lack of jurisdiction or an infringement of defendant's constitutional

rights". United States v. Spada, 331 F.2d 995, 996 (2d Cir. 1964), cert. denied 379 U.S. 865 (1965). Further, a non-constitutional claim will be cognizable under Section 2255 only upon a showing of "a fundamental defect which inherently results in a complete miscarriage of justice". Hill v. United States, 368 U.S. 424, 426 (1962). See also Davis v. United States, 417 U.S. 333, 346 (1974). The standards to be applied in federal coram nobis are similar, where, relief "should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice". United States v. Morgan, 346 U.S. 502, 511 (1954). See also United States v. Travers, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974).

Heimerle does not claim any jurisdictional defect as a result of the government's "non-compliance" with the Act, nor could he. The court certainly had subject matter jurisdiction over Heimerle's counterfeiting indictment and it obtained personal jurisdiction over him on January 18, 1973, when he personally appeared before the Court and pled not guilty to that indictment. The fact that he was returned to State custody before he was brought back to federal custody by Writ for trial can in no way vitiate the Court's power over him.

Heimerle does seem to assert that his constitutional rights were somehow violated; although he does not specify which right, other than to mention the Fifth, Sixth and Fourteenth Amendments. In the circumstances of this case, however,

it is clear that the Government's actions in writting Heimerle back to state custody between court dates impinged on none of his rights. Rather, as Judge Brieant commented in James Heimerle v. United States of America, 76 Civ. 5563 (S.D.N.Y., Dec. 15, 1976), the procedure "was humane and proper. It assured no interruption or loss of time, good time, privileges or prison earnings on his state sentence. He had adjusted well to the structured life and programs in that institution, and in view of its nearby location, no purpose would have been served to pull him out and house him in a federal facility for the indefinite period between indictment and final deposition." In short, Heimerle's best interest as a state prisoner were clearly safeguarded. Moreover, turning to his interests as a defendant under federal indictment it is significant to note that his federal trial was held well within the hundred and twenty day period provided for in Article IV (c) of the Act. Therefore, far from any violation of Heimerle's constitutional rights occurring, the procedure followed by the Government in Heimerle's case resulted in a minimum of disruption in his service of his state sentence as well as a speedy trial in the federal forum.*

*These results coincide exactly with the purposes of the Interstate Agreement on Detainers as set forth in its own Article I; that is, to encourage a prompt trial within 120 days of the prisoner's arrival in the receiving jurisdiction and to reduce uncertainties and disruption in the rehabilitation and other programs of the sending jurisdiction.

In view of these facts it is also apparent that Heimerle's complaint cannot possibly fall into the third category of "a fundamental defect which inherently results in a complete miscarriage of justice". See Hill v. United States, supra. He was found guilty of the charges in 72 Cr. 1330, by a jury. His conviction was affirmed on appeal. United States v. Rizzo et al., 492 F.2d 443 (2d Cir.), cert. denied, 94 S. Ct. 3069 (1974). He comes now, not protesting his innocence, nor even claiming that in determining his guilt some fundamental right guaranteed him by due process was denied him. At best he makes a belated claim of a procedural error^{to} which he cannot even attribute prejudice.

Not only is the claim Heimerle seeks to raise not the sort cognizable under § 2255, but in addition Heimerle waived any right he had to raise this claim when he failed to assert it before his trial, during his trial, or on appeal. First, under Rule 12(b) of the Federal Rules of Criminal Procedure, Heimerle's claim should have been made before trial in the form of a motion to dismiss his indictment. This is so, because his claim is one which attacks a defect in the institution of the prosecution. His failure to make this motion prior to trial clearly precludes § 2255 relief. See Francis v. Henderson, 44 U.S.L.W. 4620, 4621 (U.S., May 3, 1976); Davis v. United States, 411 U.S. 233 (1973). Secondly, Heimerle's failure to raise this non-constitutional issue

during trial or on appeal plainly presents a bar to his present attack. See Sunal v. Large, 332 U.S. 174, 178 (1947); United States v. Loschiavo, 531 F.2d 659, 663 (2d Cir. 1976); United States v. Wright, 524 F.2d 1100, 1101-02 (2d Cir. 1975); United States v. Travers, 514 F.2d 1171 (2d Cir. 1974). Indeed, the Supreme Court has recently articulated an inclination to expand the concepts of procedural waiver to encompass constitutional claims as well. See Francis v. Henderson, supra; Estelle v. Williams, 44 U.S.L.W. 4609 (U.S., May 3, 1976).

That there has been a waiver here is precisely the import of Judge Tenney's decision in United States v. Andrei Vincent Pierre, 76 Cr. 406 (S.D.N.Y., Oct. 21, 1976), * where the court found a defendant's motion to withdraw his guilty plea and raise a claim under the Interstate Detainer Act pursuant to Section 2255 untimely. Further, Judge Metzner, in United

*A copy of Pierre is appended.

States v. Brown 76 Cr. 244 (S.D.N.Y.) July 15, 1976, * has found that a defendant's motion to dismiss an indictment for failure of the government to comply with the Act even though made pre-trial was untimely.

The only opinion known to the Government granting post-conviction relief under Section 2255 based on a claimed violation of the Act is that of Judge Brieant in James Heimerle v. United States of America, 76 Civ. 5563 (S.D.N.Y., Dec. 15, 1976). ** Unfortunately, the Government never submitted responsive papers in that proceeding, because the Government was never served with Heimerle's motion papers. Judge Brieant has been advised of this fact and has agreed to permit the Government to file reargument papers by January 27, 1976. It is significant, we think, first, that without the benefit of the Government's views Judge Brieant did not address the question whether this was the sort of claim cognizable under § 2255.

Secondly, without the Government's briefing, Judge Brieant devoted only three sentences to the issue of waiver.

*A copy of the Brown opinion is appended.

**A copy of this Heimerle opinion is appended.

"That neither he nor his lawyer protested when the successive writs were satisfied cannot be regarded as a waiver. Waiver is the intentional relinquishment of a known right. Prior to the decision of Judge Bartels on May 17, 1976, who could have known?"

The principal defect in this analysis is the requirement that the waiver be an "intentional relinquishment of a known right." This standard, first articulated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), has applicability to a limited number of constitutional rights which affect the fairness and accuracy of the factfinding process -- such as the right to effective assistance of counsel, discussed in Johnson. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 235-46 (1973), Estelle v. Williams, supra, 44 U.S.L.W. at 4616-17 (Brennan, J., dissenting). Indeed, since the Second Circuit will not permit a Sixth Amendment speedy trial claim to be raised for the first time on appeal, see United States v. Canniff, 521 (2d. 565, 573 (2d. Cir. 1975), (and cases cited therein) it clearly would not permit such a claim to be asserted for the first time in a § 2255 action. A fortiori, a claim brought for the first time in a § 2255 proceeding dealing with the Interstate Detainer Agreement must fail.

CONCLUSION

The defendant's claim is not one cognizable under either Section 2255 or a petition for a writ of coram nobis. It is also a claim which defendant has waived by his failure to raise it pre-trial, during trial or on appeal.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

BARBARA S. AMBLER
Special Attorney
United States Department of Justice
- Of Counsel -

JAMES HEIMERLE,
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

AFFIDAVIT

72 Cr. 1330
(RLC)

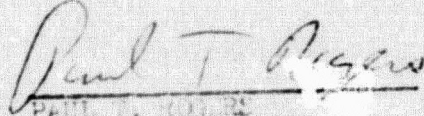
STATE OF NEW YORK)
COUNTY OF NEW YORK) s.s.
SOUTHERN DISTRICT OF NEW YORK)

PAUL T. ROBERS, being duly sworn, deposes and says:

1. I am an inmate confined at the Metropolitan Correctional Center, City and County of New York.
2. On request of the petitioner, JAMES HEIMERLE, I prepared the moving papers in this proceeding as I also did in a companion #2255 petition: James Heimerle v. United States of America, 76 Civ. 5563, S.D.N.Y., Dec. 15, 1976).
3. JAMES HEIMERLE is proceeding pro se in this matter as he did in 76 Civ. 5563.
4. More than three weeks ago petitioner HEIMERLE was transferred from the New York M.C.C. to the U.S. Penitentiary at Atlanta Georgia. Presumably he is still in transit since his family has not heard from him since his departure from the New York M.C.C.
5. Prior to his transfer from the New York M.C.C. petitioner HEIMERLE requested that I act for him in the instant matter and file any and all papers which I might deem necessary relevant to this matter.
6. Since I prepared the moving papers I am fully familiar with the instant proceeding.
7. I am a certified para-legal and have prepared numerous, successful appeals, petitions for writs of habeas corpus and petitions for writs of error coram nobis and since petitioner HEIMERLE expressly requested and authorized me to act on his behalf I am filing the annexed Reply to the memorandum in opposition

submitted by Assistant United States Attorney Ambler.

8. For the reasons set forth in the reply, respondent's memorandum is incorrect as to fact and law and HAINES'S petition should be granted.


PAUL T. ROGERS
150 Park Row

Sworn to before me this

25th day of January, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES HEIMERLE,
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

REPLY

72 Cr. 1330
(RLC)

Respondent in moving that petitioner's #2255 application be denied seems to rely on the following grounds:

1. Petitioner's claim is not cognizable under #2255 (Memorandum of Law in opposition, hereinafter, "Opposition", p. 5).
2. Judge Brieant erred in granting petitioner relief in almost identical circumstances involving another case (James Heimerle v. United States of America, 76 Civ. 5563, S.D.N.Y., Dec. 15, 1976, hereinafter, "Heimerle I") because:

(a) The Government never had an opportunity to brief the court in opposition (Opposition, p. 7).

(b) Decisions of other courts of equal jurisdiction in this district are in opposition to Judge Brieant's decision in Heimerle I (United States v. Andrei Vincent Pierre, 76 Cr. 406, S.D.N.Y., Oct. 21, 1976; United States v. Brown, 76 Cr. 244 (S.D.N.Y.), July 15, 1976) (Opposition, pp. 6-7).

Petitioner respects that the opposition submitted is an error as to facts and law.

JURISDICTION

In addition to the constitutional grounds invoked by Heimerle in his moving papers (c.f. Opposition, p. 3), the decision of the 2nd Circuit in United States v. Mauro, Docket Nos. 76-1251, 76-1252, 10/26/76, was also specifically invoked. As incredible as it may seem, in the Government's opposition of 8 pages NOT ONE REFERENCE is made to the Mauro decision and the jurisdictional authority conferred therein by the 2nd Circuit. In holding that a writ ad prosequendum "is a detainer" and subject to the procedural safeguards of the Interstate Agreement on Detainers

The Mauro court held that the sanction for failing to complete trial prior to the satisfaction of the writ ad pros. and the return of the defendant to the sending jurisdiction was "dismissal of the indictment with prejudice" (Mauro, supra., at 8). In light of the Mauro decision it should be held that the Government waived jurisdiction over further prosecution of Heimerle and thus the trial court not only lacked jurisdiction but Heimerle's basic constitutional rights were infringed upon.

It should be obvious that in holding that a writ ad pros is a detainer, the 2nd Circuit intended that over zealous prosecutors could no longer avoid the procedural safeguards of the Interstate Agreement by circumventing them through a writ ad pros. * The fact that Heimerle did not raise objection to the successive writs ad pros in this instance is immaterial as evidenced by Judge Bricant's observations in Heimerle I:

That neither he (Heimerle) nor his lawyer protested when the successive writs were satisfied cannot be regarded as a waiver. Waiver is the intentional relinquishment of a known right. Prior to the decision of Judge Bartels on May 17, 1976, who could have known?

It is further submitted that the jurisdictional question was satisfactorily disposed of by Judge Bricant's opinion in Heimerle I and that the Government's claims, tortuous as they may be, that Judge Bricant erred because the Government did not brief due to the fact that the Government was not served, are just that: tortuous and untrue. An affidavit of mailing was annexed to the moving papers in Heimerle I. The fact of the matter is that these papers WERE SERVED, but the government chose not to oppose. The quality of the instant opposition only reinforced the view that the opposition in Heimerle I, if filed, would have been as frivolous as the one under consideration.

THE "BROWN" CASE

The government relies on U.S. v. Brown (supra.) in claiming that Judge Metzner's

* Among the procedural safeguards: Written notice to the prisoner; an intervening period of 30 days during which the Governor of the sending state can refuse the request for custody; expeditious conclusion of proceedings in the requesting state (for purposes of the Agreement, the United States is a "state", c.f. Mauro)

is apposite. Even a cursory reading of the Brown case indicates that it is not at point. In Brown a specific waiver was made so that the defendant could engage in plea bargaining. In addition, Brown specifically requested that the writ ad pros be satisfied. As evidenced in the moving papers in this matter, Heimerle never requested the government to assume jurisdiction for trial, nor once jurisdiction entailed did he request that the writ ad pros be satisfied. It should be further pointed out that the Brown decision pre-dates that of the 2nd Circuit in Mauro. While the government would hold, through an Assistant U.S. Attorney that the "Mauro court erred" (Opposition, p. 1a), it is respectfully submitted that Mauro IS good law and that the instant matter should be viewed in the light of the intent of the Mauro court. That Mauro raised the jurisdictional claim in pre-trial proceedings is of no significance in light of Judge Priant's holding in Heimerle I (c.f. P. 2, supra.)

THE "PIERRE" CASE

The Pierre case (supra.) relied on by the Government is equally inapposite. Like Brown, the defendant Pierre specifically requested that the writ ad pros be satisfied. Secondly, unlike Heimerle, there were peculiar and particular circumstances in the Pierre case. Pierre, while incarcerated in another jurisdiction was technically "free" on federal bail and thus not subject to a detainer and thus prosecution could not have been conducted under the Interstate Agreement. In other words Pierre was not entitled to the procedural safeguards of the Interstate Agreement. In any case, a waiver was made by his express request that the writ ad pros be satisfied.

CONCLUSION

For the reasons set forth in the original petition and the instant reply Heimerle's petition should be granted and the indictment should be dismissed with prejudice.

For Petitioner Heimerle)

PAUL T. HOLLERS

Copy for US ATTY

A 49

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES HEIMERLE,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

A P P E A R A N C E S:

JAMES HEIMERLE, Pro Se
150 Park Row
New York, New York

HON. ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

By: BARBARA AMBLER
Special Attorney
Attorney for the United States
of America

MICROFILM

MAR 3 1977

CARTER, District Judge

45652f
76 Civ. 4277

76 Civ. 5669

FILED
U.S. DISTRICT COURT
MAR 3 9 12 AM '77
S.D. OF N.Y.

O P I N I O N

James Heimerle moves pursuant to Title 28, U.S.C. §2255 for an order vacating his sentence and dismissing the indictment on the grounds that his 5th, 6th and 14th Amendment rights and his rights in respect of Title IV of the Interstate Agreement on Detainers, Title 18, Appendix (Pub. L. 91-538, §§1-8, Dec. 9, 1970, 84 Stat. 1397-1403) have been violated. Finding no violation, the motion is denied.

On December 6, 1972, Heimerle and five other defendants were indicted under Title 18, U.S.C. §§472, 473 and 371 for conspiracy and counterfeiting. That indictment was designated 72 Cr. 1330. At the time the indictment was handed down, Heimerle was being held in New York State custody awaiting sentence, and on December 13, 1972, he was sentenced on the state matter to 4 years' imprisonment and was confined at Ossining Correctional Facility.

On January 5, 1973, a writ of habeas corpus ad prosequendum was filed to produce Heimerle in the Southern District of New York on indictment 72 Cr. 1330. Pursuant to this writ he was produced in the Southern District on January 18, 1973, at which time he entered a plea of not guilty to that indictment. After his plea was entered, Heimerle was returned to state custody. A second writ of habeas corpus ad prosequendum was issued on May 2, 1973.

Pursuant to that writ he was again brought to the Southern District for the pre-trial hearing on May 2, and on May 3, 1973 for trial on indictment 72 Cr. 1330. After trial, a jury returned a verdict of guilty on May 11, and on June 18, 1973, he was sentenced to two concurrent one year terms upon completion of his state sentence and a \$1,500 fine. On July 6, 1973, he was returned to state custody after being continually in federal custody from May 3.

At about the time 72 Cr. 1330 was proceeding, indictment 72 Cr. 1331 was also pending against Heimerle. See Judge Brieant's opinion in 76 Civ. 5563. He was arraigned in person in that case on March 19, 1973, and attended "at least one pre-trial conference in this court" in respect to that case (see 76 Civ. 5563. Being produced by writs of habeas corpus ad prosequendum. Thus, Heimerle may be and undoubtedly is confusing his appearances in this court in respect of indictment 72 Cr. 1331 with those relating to indictment 72 Cr. 1330, the instant case. The two cases, however, are separate and distinct.

Reliance on the Interstate Agreement on Detainers as a basis for dismissal of indictment 73 Cr. 1330 is mispla Art. IV of the Interstate Agreement states that when a detainer is lodged against a prisoner serving a term of imprisonment in a party state, that state shall make the prisoner available to the receiving state and trial shall

commence within 120 days of the arrival of the prisoner in the receiving state.^{1/} Art. III entitles the prisoner, after a detainer has been lodged, to request final disposition of the untried indictment. If final disposition is requested, he must be brought to trial within 180 days. However, no such request was made by Heimerle, and the 120 day period after his arrival in the "receiving state" in which trial must commence, as provided in Art. IV, governs:

It is clear that the federal government is a receiving state, United States v. Mauro, Dkt. Nos. 76-1251, 76- (2d Cir., Oct. 26, 1976) at 273-77 and therefore, bound by the terms of Art. IV.

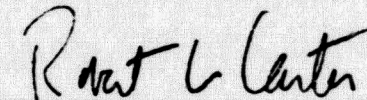
^{1/} "(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available ... upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated. ...

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The first writ of habeas corpus ad prosequendum was issued on January 5, 1976. He was returned to state custody and again brought to this district for a pre-trial hearing on May 2. Trial commenced on May 3 and, therefore, was within the 120 day strictures which Art. IV mandates. Accordingly, the claims made as to violations of the Interstate Agreement on Detainers are without merit. Since claims of violations of his constitutional rights also have no substance, the motion is without merit and must be in all respects denied.

Dated: New York, New York
March 2, 1977



ROBERT L. CARTER
U. S. D. J.

→ 20: ~~Gomez~~

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JAMES HEIMERLE,
Petitioner

MOTION TO RECONSIDER

-against-

76 Civ. 5669

UNITED STATES OF AMERICA, Respondent

----- x

Comes now the Petitioner, James Heimerle, to move the Court for the underlying reasons to reconsider petitioner's motion to vacate and dismiss indictment 72 Cr 1330, of which was denied by the Honorable Court March 3, 1977.

Petitioner relies on the explicit language of the Agreement on Detainers and in the opinion of the Court at page three (3) the Court notes that the federal government is a receiving states and thus bound by the terms of the Agreement and petitioner's circumstances will be governed by Article IV of the Agreement. Because of the ambiguousness of the Courts opinion and the unambiguous terms of the Agreement as per Article IV petitioner moves the court for a clarification if the Court is to assume its March 3, 1977 opinion, is as a matter of law correct.

Article III provides a mechanism for a prisoner in a party state ~~xxxxxx~~ whom a detainer has been lodged by any party state to request a final disposition of the entered charge within 180 days of his written request.

Article IV provides a method for prosecutors to secure prisoners serving sentences in other jurisdictions for a prompt trial within 120 days after his arrival in the party state.

Article IV(e) further provides:

If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoners being returned to the original place of imprisonment pursuant to Article V(e)

MAR 2 1977

hereof, such indictment, information, or complaint shall not be of any further force or effect, and the Court shall enter an order dismissing the same with prejudice.

In this case, defendant was taken from Ossining Correctional Facility, New York State, where he was serving four (4) years imprisonment, and brought to the Federal Detention Headquarters, West Street, New York, then subsequently to Federal Court, defendant was arraigned on indictments 72 Cr 1330 and 72 Cr 1331 before the Honorable Robert L. Carter on January 18, 1973 (see docket entries page three (3) of 72 Cr 1330); on the following day, January 19, 1973 the government filed notices of readiness for trial on both indictments (see page two (2) of 72 Cr 1330 docket entries, also see page one (1) of 72 Cr 1331 docket entries). It was up to the government to try the defendant on both indictments within 120 days, and the government was further obliged to keep defendant in its custody pending trial.

This was not done in the instant case. Rather, defendant was returned to the state, approximately, one month after the arraignment date of January 18, 1973. This was in direct violation of the explicit language of the Agreement on Detainers, and requires a dismissal of the indictments with prejudice. See U.S. v. Mauro 544 F2d. 588 (2d cir. 1976) Affirming 414 F. Supp. 358 (E.D.N.Y. 1976) and the cases cited therein. See also U.S. v. Cyphers, ___ F2d. ___ (2d cir 1977) decided February 8, 1977 Slip opinion No. 328, 329; See also U.S. v. Ford, ___ F2d. ___ (2d cir. 1977) decided February 3, 1977 Slip opinion No. 419.

Conclusion

For the above stated reasons the Courts opinion of March 3, 1977 should be withdrawn and an order should be entered as a matter of law dismissing the indictments with prejudice.

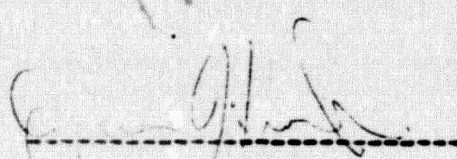
Respectfully submitted;

Dated: March 15, 1977


James Heimerle
PMB 01873
Atlanta, Ga;

Sworn to before me this
day of March 1977

James Heimerle being duly sworn, deposes and says, that on this day of March 1977 I have caused to be deposited into the U.S. Mails a copy of the above papers being true and correct, to the Hon. Robt. B. Fiske, U.S. Courthouse-Foley Square, N.Y., N.Y.

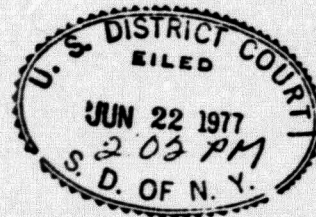

James Heimerle
PMB 01873
Atlanta, Ga.

Sworn to before me this

day of March 1977
~~Notary Public, Authorized By the Act of~~
~~July 7, 1954 to Administer Oaths (18 U.S.C.~~
4004)

copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



JAMES HEIMERLE,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

76 Civ. 4277
76 Civ. 5669

46051

APPEARANCES:

JAMES HEIMERLE, Pro se
150 Park Row
New York, New York

HON. ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
by: BARBARA AMBLER
Special Attorney
Attorney for the United States
of America

CARTER, District Judge

OPINION

The petition to reconsider is granted. The defendant moved under 28 U.S.C. § 2255 to vacate his sentence and dismiss the indictment because of the government's lack of compliance with Article IV of the Interstate Agreement on Detainers Act (Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397 (1970) reprinted in 18 U.S.C. App. at 207 et seq.). On March 2, 1977, I denied the motion on the ground that the defendant had been brought to trial within 120 days after the federal government acquired custody of him from the state as required under Article IV(c) of the Detainers Act.

In his petition for rehearing, the defendant argues that the violation by the government which he claims entitled him to have the indictment dismissed is that he was returned to state custody without being tried on this indictment after detainers had been filed by the government and after he had been delivered into federal custody, not that the government failed to bring him to trial within the 120 days.

On reconsidering United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), particularly in the light of United States v. Cyphers, ___ F.2d ___, Nos. 76-1131, 76-1160, Slip. Op. 1737-1752 (2d Cir. decided Feb. 8, 1977); and United States v. Ford, ___ F.2d ___, No. 76-1319, Slip. Op. 1689-1703 (2d Cir., decided Feb. 3, 1977), it is clear that defendant is correct. As this circuit has interpreted Article IV(e) of the Detainers Act, a defendant once turned over to federal authorities pursuant to a writ of habeas corpus ad prosequendum to answer federal charges must be tried on the pending federal charges before being returned to state custody. Although the provisions of the Act may be waived, see United States v. Ford,

at 1698, in the absence of waiver, the return of a defendant to state custody without trial after a detainer has been lodged against him necessitates dismissal of the federal indictment.

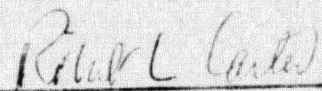
No waiver occurred here. It is true that Heimerle did not protest the government's use of a series of successive writs of habeas corpus ad prosequendum pursuant to which he was brought in federal custody to answer various charges and returned to state custody without a trial in the federal matters. As Judge Briant stated in a companion case:

"Waiver is the intentional relinquishment of a known right. Prior to the decision of Judge Bartels [in Mauro] on May 17, 1976, who could have known?"

Heimerle v. United States, 76 Civ. 5563 (S.D.N.Y., Dec. 15, 1976). Defendant was delivered into federal custody on January 18, 1973, pursuant to a writ of habeas corpus ad prosequendum at which time he entered a plea of not guilty and was returned to state custody without first being tried on the federal indictment. He was again delivered into federal custody on May 2, 1976, pursuant to a second writ of habeas corpus ad prosequendum for pre-trial hearings and trial May 2-May 11. Since he was returned to state custody in January, 1973, without being tried on this indictment, he is entitled to dismissal of the indictment with prejudice.

SO ORDERED.

DATED: New York, New York
June 22, 1977


ROBERT L. CARTER
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

JAMES HEIMERLE, :

Petitioner, :

-v-

:

AFFIDAVIT

UNITED STATES OF AMERICA, :

76 Civ. 4277

76 Civ. 5669

Respondent. :

- - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

BARBARA S. JONES, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in
the office of the United States Attorney for the Southern
District of New York.

2. I submit this affidavit and the attached
memorandum of law in support of the Government motion for
reconsideration of the order of this Court, filed June 22,
1977, which vacated the sentence of James Heimerle in
72 Cr. 1330 and dismissed the indictment against him, with
prejudice to the Government.

3. The Government submits that Heimerle's claim
is not cognizable in a Section 2255 petition, and that even
if it were, it was waived by his failure to raise it before
or during trial or on direct appeal. Further, the Govern-
ment believes that the Mauro, Cyphers and Ford opinions

relied on by this Court are all distinguishable from Heimerle's case and that even if they were not they should not be given retroactive effect.

4. Based upon the foregoing reasons, more full, set forth in the Government's memorandum of law, the Government respectfully submits that this Court should grant its motion to reconsider and reinstate the sentence and indictment of James Heimerle in 72 Cr. 1330.

BARBARA S. JONES
Assistant United States Attorney

Signed and sworn to before me

this day of , 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES HEIMERLE,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

76 Civ. 4277
76 Civ. 5669

MEMORANDUM OF LAW

Preliminary Statement

The United States of America respectfully moves for reconsideration of the order of this Court (Carter, J.), filed June 22, 1977, which vacated the sentence of James Heimerle in 72 Cr. 1330 and dismissed that indictment against him, with prejudice to the Government. James Heimerle v. United States of America, 76 Civ. 4277, 76 Civ. 5669 (S.D.N.Y., June 22, 1977).

Petitioner James Heimerle moved on December 17, 1976, pursuant to Title 28, United States Code, Section 2255, to vacate his sentence, entered in this Court (Carter, J.) on June 18, 1973, and to dismiss the underlying indictment charging him, along with five other defendants, with counterfeiting and conspiracy in violation of Title 18, U.S.C. Sections 472,

473 and 371. He contended that Article IV of the Interstate Agreement on Detainers (hereinafter referred to as "the Agreement"), Title 18, U.S.C., App. (Pub. L. 91-538, Sections 1-8, Dec. 9, 1970) was violated when the United States returned him to state custody, where he had been serving a state sentence, without having first tried him on the federal indictment.

On March 2, 1977, this Court denied Heimerle's motion in all respects. However, on June 22, 1977, this Court granted Heimerle's motion to reconsider and reversed its March 2 decision. The basis for this reversal was the Court's interpretation of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), United States v. Cyphers, ___F.2d___ (2d Cir. 1977), and United States v. Ford, 550 F.2d 732 (2d Cir. 1977).

FACTS

James Heimerle was indicted on December 6, 1972 for the above-named violations of federal law.¹² At the time of this indictment, Heimerle was a prisoner in New York state custody awaiting sentence on an unrelated case. On December 13, 1972, he was sentenced in the state matter to a term of four years imprisonment. He commenced the service

of this sentence on December 21, 1972, at Ossining Correctional facility.

On January 5, 1973, a writ of habeas corpus ad prosequendum was filed to produce Heimerle in the Southern District of New York for arraignment on 72 Cr. 1330. On January 18, 1973 he was produced, pursuant to this writ, before the Honorable Robert L. Carter and he pled not guilty to the indictment. After pleading, Heimerle was returned to state custody. On May 3, 1973, a second writ of habeas Corpus ad prosequendum was issued in connection with this indictment, which caused Heimerle to be transported by the United States Marshal from Greenhaven County Jail, Stormville, back to the United States Courthouse, Foley Square for trial on the indictment. On May 11, 1973 Heimerle was convicted of possession and conspiracy to possess and distribute counterfeit \$50 and \$100 bills, after a jury trial. On June 18, 1973, the Honorable Robert L. Carter sentenced him to two concurrent one-year terms of imprisonment to commence upon the completion of his four year state prison sentence, and a \$1500 fine. Heimerle remained in federal custody continuously from May 3, 1973 to July 6, 1973, on which date he was delivered back into state custody at the Greenhaven County Jail.

POINT ONE

A VIOLATION OF ARTICLE IV OF THE
INTERSTATE AGREEMENT ON DETAINERS
IS NOT A CLAIM COGNIZABLE UNDER
18 U.S.C., SECTION 2255.

It is well settled that to warrant collateral review under 18 U.S.C. §2255, the claimed error must be one of lack of jurisdiction, deprivation of a constitutional right or a fundamental defect resulting in a complete miscarriage of justice. Davis v. United States, 417 U.S. 333, 346 (1974) quoting Hill v. United States, 368 U.S. 424, 429 (1962); see also Alfano v. United States, Dkt. No. 77-2013, slip op. 4079 (2d Cir. June 8, 1977); United States v. Spada, 331 F.2d 995, 996 (2d Cir.), cert. denied, 379 U.S. 865 (1965). The facts of this case fall into none of these categories. In short, no exceptional circumstances are presented here where "the need for [the] remedy afforded by the writ of habeas corpus is apparent." Hill v. United States, supra at 429.

Heimerle does not claim any jurisdictional defect as a result of the Government's alleged violation of the Act, nor could he. The Court certainly had subject matter jurisdiction over Heimerle's counterfeiting indictment and it obtained personal jurisdiction over him on January 18, 1973, when he personally appeared before the Court and pled not guilty to that indictment.^{/2} The fact that he was returned

to state custody before he was brought back to federal custody by a writ for trial can in no way vitiate the Court's power over him.

Since this Court unquestionably has subject matter jurisdiction to render the judgment of conviction now being collaterally attacked, then the inquiry becomes whether defendant's claim raises a substantial constitutional issue. A violation of Article IV(e) clearly does not involve a substantial constitutional issue, or indeed any constitutional issue. The right is merely a statutory one having no constitutional derivation or nexus. Specifically, Heimerle can show no prejudice to or loss of any rights under the Fifth or Fourteenth Amendments. Rather, his best interests as a state prisoner were clearly, and carefully, safe-guarded. He was permitted to continue in the programs conducted by the state institution, and suffered no hardship in travelling due to the close proximity of the federal courthouse. In short, his return to state custody did not "significantly impede the development of a coherent program for the prisoner's punishment and rehabilitation." United States v. Ford, at 739. Rather, it furthered that goal. Further, any Sixth Amendment claim is purely illusory. Heimerle was tried swiftly, well within the strictures of

Barker v. Wingo, 407 U.S. 514 (1972) and of this Court's local speedy trial rules and clearly within the one hundred and twenty day period provided for in Article IV(c) of the Agreement

Finally, any claim of a "fundamental defect which inherently results in a complete miscarriage of justice."

Davis v. United States, supra must also fail.

While the Second Circuit has held collateral relief warranted as a result of an intervening change in law, United States v. Loschiavo, 531 F.2d 695, 659 (2d Cir. 1976); see also, United States v. Travers, 514 F.2d 1171 (2d Cir. 1974); United States v. Liquori, 430 F.2d 842 (2d Cir. 1970), cert. denied, 402 U.S. 948 (1971), under none of these decisions, including Davis, would the defendant here be entitled to relief.

In both Davis and Loschiavo, the concern was with a change in the law subsequent to the affirmance of the respective convictions which, if available to Davis and Loschiavo, would have completely exonerated them. For example, the intervening change in law meant that Loschiavo "was being imprisoned for something that was not a federal criminal offense" 531 F.2d at 665. So too in Davis; due to the intervening change in the law it was possible, if his contention was correct, that his "conviction and punishment are for an

act that the law does not make criminal." 417 U.S. at 346. These were, then truly situations which would inherently result "in a complete miscarriage of justice." They therefore presented, as held in each case, "exceptional circumstances. Similarly in Travers, the conduct of which Travers stood convicted no longer constituted a federal offense.

However, the decision in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), even if considered an intervening change in law, does not result in imprisoning Heimerle for "something that was not a criminal offense," 531 F.2d at 665. His conduct constitutes a federal criminal offense despite the "intervening change in law" effected by Mauro. Accordingly, there would be no miscarriage of justice in denying collateral relief under Section 2255. Hill v. United States, supra. Further, with only one exception, Enright v. United States, 77 Civ. 449 (S.D.N.Y. July 13, 1977) (Metzner, J.) Southern District Courts, while not explicitly holding 284 U.S.C. §2255 inapplicable to the Agreement, have declined to grant collateral relief for alleged violations of that legislation. See Heimerle v. United States, 76 Civ. 5563 (S.D.N.Y., July 6, 1977) (Brieant, J.); United States v. Pierre, Dkt. No. 76-1462 (S.D.N.Y., Oct. 21, 1976) (Tenney, J.); United States v. Lee,

76 Cr. 552 (S.L.N.Y., August 16, 1976) (Goettel, J.);
United States v. Brown, 76 Cr. 244 (S.D.N.Y., July 15, 1976)
(Metzner, J.).

In conclusion, Heimerle was neither prejudiced by his return to state custody, nor was the integrity of the fact finding process affected by his transfer. The defendant was found guilty, after a jury trial, of the charges in the indictment, and his conviction was affirmed

on appeal. United States v. Rizzo, et al., 492 F.2d 443 (2d Cir.), cert. denied, 417 U.S. 944 (1974). Now belatedly asserting a claim of procedural error, he is neither protesting his innocence, nor claiming any deprivation of due process in determining his guilt, and he cannot allege any actual prejudice. Surely, without more, a claim such as this does not merit review under 18 U.S.C. §2255.

POINT TWO

HEIMERLE HAS WAIVED HIS RIGHT TO RAISE THIS CLAIM

Heimerle's failure to raise this claim before his trial, during his trial, or on appeal clearly precludes relief under Section 2255. Sunal v. Large, 322 U.S. 174, 178 (1947); United States v. Loschiavo, supra., at 663; United States v. Wright, 524 F.2d 1100, 1101-02 (2d Cir. 1975). Under Rule 12(6) of the Federal Rules of Criminal Procedure, this claim should have been raised before the trial in the form of a motion to dismiss the indictment./3

Since Heimerle did not raise it and since a violation of Section IV(e) of the Agreement, is not the type of defect in the indictment which either "fails to show jurisdiction in the court or to charge an offense", the provisions of Rule 12(f) apply and this claim must be deemed waived. In short, a claimed violation of Article IV(e):

stems from the government's administrative treatment of the defendant after indictment and before trial. As such, it is a defense "based on defects in the institution of the prosecution" within the meaning of Fed. R. Crim. P. 12(b)(1) and "must be raised prior to trial" or it is waived under Fed. R. Crim. P. 12(f). United States v. Cyphers and Ferro, supra at 1750 (dissenting op. per Timbers, J.)

Further, the majority opinion in Cyphers did not dispute this waiver principle but rather found that since the defendant Ferro did not even know that a detainer had been lodged against him prior to his trial, he would be allowed to raise the Article IV(e) issue for the first time on appeal. Moreover, in Ford, the Court held that the claimed violation of Article IV(e) had been waived by the defendant's request to be returned to state custody. Thus, both Ford and Cyphers are authority for the proposition that an Article IV(e) violation is waivable.

That his conclusion is undoubtedly correct is also supported by the fact that the Supreme Court has held that even the constitutional right to a speedy trial if not timely asserted is deemed to be waived. Barker v. Wingo, 407 U.S. 514, 530 (1972); see also United States v. Canniff, 521 F.2d 565, 573 (2d Cir. 1975); United States v. Lustman, 258 F.2d 475 (2d Cir.), cert. denied, 358 U.S. 880 (1958); Rule 48(h), Fed. R. Crim. Proc. A fortiori, a non-constitutional, statutory right such as the one created by Article IV(e) must be deemed waivable.

Moving to the question of what constitutes a waiver under Rule 12, the requirement of an understanding and knowing waiver first articulated in Johnson v. Zerbst, 304 U.S. 458 (1938) is not required here. In Davis v. United States, 411 U.S. 233, 236 (1973), the Court held that Rule 12(f) does not require the traditional Johnson-type waiver. Davis is applicable here since the alleged defect concerning the Agreement does not approach, in either seriousness or magnitude, the defect alleged in Davis. Indeed, the Supreme Court has recently articulated an inclination to expand the

concepts of procedural waiver to encompass constitutional claims as well, Stone v. Powell, 428 U.S. 465 (1977); Francis v. Henderson, 425 U.S. 535 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), as well as statutory violations, cf. United States v. Wild, Dkt. No. 76-110 (D.C. Cir. Jan. 21, 1977); United States v. Gelb, 175 F. Supp 267 (S.D.N.Y., 1959) (statute of limitations is waivable).

In fact, a defendant can waive even a basic constitutional right, and such a waiver need not be knowingly and deliberately made. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). As the Court stated in Schneckloth, "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." Id. at 237 (emphasis added). Certainly, the Article IV(e) sanction is clearly not such a right. This is crucial, for it is this nature of the guarantee that, according to the Schneckloth Court, warrants application of the "strict standard." Id. at 238.

Moreover, Article IV(e) is also unrelated to the other trial rights specified in Schneckloth which require application of the Johnson criteria, Id. See also, Estelle v. Williams, supra, and Francis v. Henderson, supra. In Estelle, the Supreme Court rejected an argument that these criteria, requiring a "knowing and intelligent waiver," apply to "the vast array of trial decisions, strategic and tactical, which must be made before and during trial" 425 U.S. at 512 (emphasis added).

Therefore, since the Rule 12 waiver provisions do not require a Johnson-type waiver to be established before they may be invoked, and Ford holds that Rule 12(f) is applicable to Article IV(e), we contend that the failure of Heimerle to timely assert his claim prior to trial pursuant to Rule 12(b), constituted a waiver of this claim under Rule 12(f), regardless of his actual knowledge of the nature of the right being waived Schneckloth v. Bustamonte, supra. To hold otherwise would be to elevate this non-guilt related non constitutional claim to a higher level than warranted, either by precedent or logic. Since there has not been the required showing of cause to permit "relief from the waiver," Rule 12(f), United States v. Davis, supra, we submit that the waiver of this claim should remain undisturbed. Even leaving aside a Rule 12 waiver, effected

by a failure to raise this claim pre-trial, non-constitutional claims which could have been reviewed on direct appeal "may not be asserted in collateral proceedings." Stone v. Powell, 428 U.S. 465, 477 n.10 (1976). This claim is not constitutional, could have been asserted on direct appeal, and is a procedural point unrelated to the fundamental fairness of the trial.

Further, even in two areas which may well affect fundamental fairness - plea procedure under Rule 11 of the Federal Rules of Criminal Procedure and §2518(8)(a) of Title 18 dealing with the sealing of wiretap tapes, this Circuit has found that a showing of actual prejudice must be made for success in a collateral attack. Del Vecchio v. United States, Dkt. No. 76-2165, slip. op. 3719, 3728 (2d Cir. May 24, 1977) and Alfano v. United States, Dkt. No. 77-2013, slip. op. 4079, 4081 n.2 (2d Cir. June 8, 1977). The Alfano decision is particularly illustrative, inasmuch as this Circuit has shown that it will presume prejudice if a claim of delay in sealing can be shown, and is raised pre-trial, (United States v. Gigante, 538 F.2d 502 (1976)) but that it will demand evidence of actual tampering when relief is sought for the first time by a writ of habeas corpus.

POINT THREEUNITED STATES v. MAJRO SHOULD NOT
BE APPLIED RETROACTIVELY

Even if this Court rejects the positions taken in Points I and II, United States v. Mauro, 544 F.2d 588 (2d Cir. 1976)^{/4} should not be applied retroactively to an alleged violation of the Agreement which antedates that decision, especially when raised for the first time in a §2255 petition.

In numerous decisions concerning the possible retroactivity of prior decisions, the Supreme Court has routinely granted full retroactive effect only in two situations: where the new decision has remedied an "aspect of the criminal trial that substantially impairs its truth-finding function," United States v. Peltier, 422 U.S. 531 535 (1975),^{/5} and where the conduct that is the subject of the indictment was found under the prior decision to be "constitutionally immune from punishment," see, e.g. Robinson v. Neil, supra, 409 U.S. at 509 (giving retroactive effect to Waller v. Florida, 397 U.S. 387 (1970); United States v. U.S. Coin & Currency, 401 U.S. 715, 723-24 (1971); Marchetti v. United States, 390 U.S. 39 (1968), and

Grosso v. United States, 390 U.S. 62 (1968), (applied retroactively). See also United States v. Travers, 514 F.2d 1171 (2d Cir. 1974). In other situations, the Supreme Court has adopted a three-prong test based upon 1) the purpose to be served by the new decision, 2) the extent of reliance upon the previous law by the Government, and 3) "the effect on the administration of justice of a retroactive application of the new decision." Halliday v. United States, 394 U.S. 831, 832 (1969); Desist v. United States 394 U.S. 244, 249 (1969); Stovall v. Denno, 388 U.S. 293, 297 (1967). We submit that each of these factors supports the Government's position that Mauro should not be applied retroactively; and certainly any balancing test weighing these three considerations together will support that position. ¹⁶

First, the policy considerations underlying the Agreement, and presumably the Mauro decision, will not be served by vacating the sentence and dismissing the indictment here on collateral review. The purposes of the Agreement, as set out in Art. I, are to avoid "uncertainties which obstruct programs of prisoner treatment and rehabilitation," and to promote "the expeditious and orderly disposition" of outstanding charges and "cooperative procedures" in dealing

with interjurisdictional transfer of prisoners. None of these policies, which at any rate have nothing to do with improving the "truth-finding process," Gosa v. Mayden, 413 U.S. 665, 680 (1973) (plurality opinion), would be furthered by retroactive application. Heimerle's programs of prisoner treatment and rehabilitation were in fact enhanced by his return to State custody. "Cooperative procedures" were certainly unnecessary in view of the acknowledged acquiescence of the New York authorities to the authority of a federal writ. And Heimerle's interest in an "expeditious and orderly" processing of his charges was more than adequately protected by his rights to a speedy trial under the Sixth Amendment and the local speedy trial rules.¹⁷

The second prong of the retroactivity test, that is, reliance on prior law becomes clearer when considered in this context. Every party to Heimerle's transfer to the Southern District of New York believed that the Federal Government was validly proceeding on the strength of a writ of habeas corpus ad prosequendum with none of the limitations added by the Agreement. Indeed, all parties to this matter treated the manner in which Heimerle was brought to the Southern District as nothing more nor less

than the Federal Government's exercise of its power under Title 28, United States Code, Section 2241(c)(5). We submit that this reliance was entirely justified. The Mauro court noted in its decision that in finding that the Agreement applied to the Federal Government, the question was "one of first impression in this Court." 544 F.2d at 589. While the majority in Mauro concluded that a writ constituted a "request" under the Agreement, its principal basis for doing so - the assertion that "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ," 544 F.2d at 592 (footnote omitted) -- ignores the fact that the defendant under Art. III(a) can himself trigger the applicability of the Agreement. Even if the Mauro majority's fear of circumvention were sound, prospective application of this essentially prophylactic reasoning is clearly sufficient to cure any alleged ill. Heimerle simply reaps a "windfall benefit," Michigan v. Payne, 412 U.S. 47, 53 (1973), from a retroactive application of Mauro.

Finally, application of the third prong of the test, "the effect on the administration of justice of a retroactive application" of Mauro, is clearest of all.

Since the accession of the Federal Government to the Agreement in 1970 virtually no one - and certainly no one in this Circuit - asserted any rights under that Agreement with respect to the Federal Government until 1976. Since 1976, three decisions have reversed a conviction upon the basis of the Agreement. United States v. Mauro, supra, United States v. Ford, supra, United States v. Cyphers, supra.

It is apparent that since there are significant numbers of prisoners whose transfers antedated the Mauro decision, numerous claims will be brought under this aspect of the Agreement. Adding to this the spectre of collateral attacks on convictions since 1970, the number of convictions possibly endangered by retroactive application of Mauro is frightening.¹⁸ The inequity of that situation is particularly clear when it is considered, first, that the issue causing reversal has absolutely nothing to do with the guilt or innocence of the defendants, who are thus concededly or demonstrably guilty of serious crimes; second, that all parties were proceeding in good faith and reasonable reliance on prior law; and, third, that in many cases (such as this one) the rights now asserted under the Agreement are already protected by other laws to which the parties did devote their attention.

In short, under the tests developed by the Supreme Court to determine the retroactive effect of a decision, Mauro should be applied - if at all - prospectively only.

POINT IV

MAURO, CYPHERS AND FORD ARE CLEARLY
DISTINGUISHABLE FROM THIS CASE, AND
SHOULD NOT BE APPLIED

In United States v. Cyphers, ___ F.2d ___

(2d Cir. 1977), the Court held that since defendant Ferro had no knowledge prior to trial that a detainer had been lodged against him, he could invoke Article IV(e) for the first time on appeal. However, the Court was dealing with a species of a speedy trial claim, which is factually different from Heimerle's position. In Cyphers¹⁹ the defendants were not tried until over two years after the first habeas corpus ad prosequendum was served on September 20, 1973 and after a detainer was lodged on November 12, 1973; the trial commenced in January, 1976. The Court's language is illuminating:

"The main purpose of the Act is to provide means for expeditious resolution of all outstanding charges which may affect the conditions or duration of imprisonment and treatment." United States v. Cyphers, slip op. at 1745.

It is apparent that the Court was concerned with the length of delay between indictment and trial, and permitted Ferro's

claim for the first time on appeal based upon the explicit terms of the Agreement. However, it is clear that in finding that Article I of the Agreement states that one "purpose of [the] agreement [is] to encourage the expeditious and orderly disposition of" the Court was referring to the time elapsed between the first habeas corpus ad prosequendum in September, 1973 and Ferro's ultimate trial in January, 1976. Id. at 1745. Based on these facts, it is apparent that Cyphers is factually different from this case. Heimerle was tried, and found guilty by a jury, well within 20 days, the time set by the statute.

Additionally, the defendant's argument in Cyphers was based upon the fact that a detainer had actually been lodged against him; whereas in the present case, the question turns only upon the employment of the writ of habeas corpus ad prosequendum. In Heimerle's situation, there was clearly an "orderly disposition" of his federal case and no violation of Article IV(e). Id.

United States of America v. Ford, 550 F.2d 732 (1977) is similar to Cyphers in that the violation of the Agreement claim was presented on appellate review, and in that the detainer claim was a species of a speedy trial

claim. In Ford, the Court reluctantly reversed the trial court conviction because of the speedy trial requirements of Article IV(c) and V(c) directing the indictment to be dismissed with prejudice. 530 F.2d at 742, 744.

Again, like Cyphers, the Ford case presented the issues raised on direct appeal; again, like Cyphers, a detainer was lodged against Ford, in addition to a writ of habeas corpus ad prosequendum; and again, like Cyphers, the time period elapsed between the writ and the trial date was more than the 120 days required by the statute, clearly a violation of the Agreement. None of these relevant facts exist in Heimerle's claim. Trial was held within the express 120 day limit; no detainer was ever lodged against Heimerle;¹⁰ and most importantly, Heimerle raised his claim for the first time collaterally in a §2255 petition.

It is apparent that the Cyphers and Ford decisions were meant to be strictly construed on their facts. Using these cases as grounds to grant Heimerle's petitions deviates from the clear import of the language and the reasoning employed by the Second Circuit. In no way should Heimerle, found guilty of the charges in the indictment, benefit from cases clearly distinguishable from his case.

Further there is some question as to whether this type of claim should even be permitted on direct appeal, clearly implying that this claim, brought for the first time on collateral attack, should not be entertained. See United States of America v. Cyphers, ___F.2d___ (1977) (slip op. at 1749, Timbers, J., dissenting).

Mauro too is limited to its facts. Each defendant in that case had raised the claimed violation prior to ^{/11} trial, clearly preserving their rights upon appellate review, leaving no issue of waiver available to the Government. While the decision might be considered analogous to the present situation, Since the Court found that the agreement was violated by returning the defendants to state custody before disposition of the federal charges, we reassert that that holding is clearly limited to its facts, and cannot be applied to a §2255 proceeding.

CONCLUSION

The petitioner's claim is not one cognizable under either Section 2255 or a petition for a writ of coram nobis. It is also a claim which defendant has waived by his failure to raise it pre-trial, during trial or on appeal.

Respectfully submitted,

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FOOTNOTES

1/ The petitioner has fully served his sentence under his federal conviction and this petition should actually be one under §2254 for coram nobis. See our original Memorandum of Law.

2/ It is also apparent that the Court had personal jurisdiction over the defendant by virtue of the fact that Heimerle was incarcerated in Ossining Correctional Facility which is within 100 miles of the Federal Courthouse. F.R.Civ.P. 4(e). Regardless, Heimerle could not raise lack of personal jurisdiction on collateral attack. See United States v. Rosenberg, 195 F.2d 583 (2d Cir.), cert denied, 344 U.S. 838 (1952).

3/ Rule 12(b) provides (in pertinent part):

Pretrial Motions. Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

Rule 12(f) provides:

Effect or failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

4/ Petition for certiori was filed on May 9, 1977 and is presently pending.

5/ See, e.g., Ivan v. New York, 407 U.S. 203, 204 (1972) (In re Winship, 397 U.S. 358 (1970) applied retroactively); McConnell v. Rhay, 393 U.S. 2 (1968) (giving retroactive effect to the right to counsel provided in Mempa v. Rhay, 389 U.S. 128 (1967)); Picklesimer v. Wainwright, 375 U.S. 2 (1963) (retroactive effect of Gideon v. Wainwright, 372 U.S. 335 (1963)); see also Morgan v. Sieloff, 20 Crim. L. Rep. 2252 (7th Cir., Nov. 22, 1976).

6/ Most of the decisions cited in support of the three-pronged approach involved the possible retroactive application of new constitutional procedural decisions, and indeed the doctrine of prospectivity received its genesis - or at least its impetus - from the Supreme Court's early decisions involving the exclusionary rule. See, e.g., Linkletter v. Walker, 381 U.S. 618, 629 (1965); Johnson v. New Jersey, 384 U.S. 719 (1966). Nonetheless, the retroactivity analysis of those cases is fully applicable to Mauro. First, the decision in Mauro was not simply an interpretation of the Agreement, in the sense that even if the Agreement were read to apply to the federal Government, that would not in itself deal with the problem of the Government's power acting under a writ. The conclusion of the Mauro majority limiting the Government's age-old power under a writ - reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement," 544 F.2d at 592 - was essentially a prophylactic one of precisely the sort to which the retroactivity analysis most directly applies, Michigan v. Payne, 412 U.S. 47, 53 (1973). At any rate, the applicability of this analysis to interpretation of statutes, even when the predicate decision did not "overrule" a prior judicial determination, was made explicitly clear by this Court's unanimous, en banc decision in United States v. Kaylor, 491 F.2d 1133, 1138-39 (2d Cir. 1974) (en banc), applying its interpretation of the Youth Corrections Act prospectively only, and specifically employing the Desist and Stovall tests. Similarly, in Bailey v. Holley, 530 F.2d 169, 172-74 (7th Cir. 1976), a defendant sought to take advantage of the Circuit's earlier decision in King v. United States, 492 F.2d 1337 (7th Cir. 1974), that section 555(e) of the Administrative Procedure Act applied to the United States Board of Parole. Acknowledging that Bailey was in precisely the same situation as King, the Court nonetheless ruled that the King decision would be prospectively applied only. In doing so the Court specifically rejected "petitioner's contention that the Stovall criteria for deciding questions of retroactivity are not applicable to decisions based on statutory construction." Id. at 173. See also Mower v. Britton, 504 F.2d 396, 399 (10th Cir. 1974). Other circuits

6/ (continued) have ruled similarly. See, e.g., Owens v. United States, 383 F. Supp. 780, 785-87 (M.D. Pa. 1974), aff'd 515 F.2d 507 (3d Cir. 1975), cert. denied, 423 U.S. 996 (1976) and Jackson v. United States, 510 F.2d 1335 (10th Cir. 1975) (Supreme Court's interpretation of Youth Corrections Act in Dorszynski v. United States, 418 U.S. 424 (1974), to be applied prospectively only); Krilich v. United States, 502 F.2d 680, 683 (7th Cir. 1974), cert. denied, 420 U.S. 992 (1975) (Prior decision holding that Special Agent's Report on tax prosecution was a "statement" under the Jencks Act to be applied prospectively only). Indeed, the Supreme Court itself has afforded prospective applicability to its prior interpretation of written law. In McCarthy v. United States, 394 U.S. 459 (1969), the Court held that in the absence of strict compliance with Rule 11 of the Federal Rules of Criminal Procedure a guilty plea must be vacated. Although, as a concurring justice noted, the decision "merely interpreted Rule 11 ... and held that the rule must be strictly applied according to its terms," Halliday v. United States, 394 U.S. 831, 834 (1969) (Harlan, J., concurring), the Court held that it would be applied prospectively only, Halliday v. United States, supra, 394 U.S. at 832-33, explicitly following the three-pronged test of Desist and Stovall.

7/ The Supreme Court has noted that in determining possible retroactive effect, it will also look to whether "other safeguards are available" to protect the right asserted. Johnson v. New Jersey, supra 384 U.S. at 728. The Government does not contend that there are no limitations on the time period during which Heimerle should have been brought to trial. Clearly, all of the laws specifically designed to promote his interest in a speedy trial - that is, the Sixth Amendment and the local speedy trial rules - apply to his case. We do submit, however, that it is inherently unfair to reverse a conviction because of non-compliance with additional requirements when at the time of trial no one (including the defendant) considered that they applied to the Federal Government.

8/ In United States v. Kaylor, supra, this entire Court noted "great concern lest our burdened federal court system be flooded with new motions to vacate sentences" 491 F.2d at 1138. That concern must surely arise here a molto fortiori when the concern is that the courts will be burdened with attempts by concededly guilty defendants seeking release, and not merely resentencing.

9/ It must also be recognized that both Cyphers and Ferro were originally indicted on September 18, 1973 in a 43-count indictment, 73 Cr. 848. Defendants moved on February 19, 1974 to dismiss the indictment. The motion was granted on April 5, 1974, and on April 23, 1974 a new indictment, 74 Cr. 322 was filed, charging Cyphers and Ferro with two counts of mailing of fraudulently obtained airline tickets. Count I of 74 Cr. 322 was derived from Count 20 of the original indictment. On April 1, 1975 the Government filed another indictment on a separate transaction, 75 Cr. 259, charging the defendants with one count of mailing of a fraudulently obtained airline ticket. Trial on both these indictments began on January 6, 1976. The Court dismissed the second indictment, 74 Cr. 322, as to Ferro on the ground that the Agreement had been violated.

10/ It must be remembered that Mauro, holding that a writ of habeas corpus ad prosequendum is a detainer within the meaning of the Agreement, antedates the facts of this case.

11/ Both defendants, Mauro and Fusco, were arraigned before Hon. John R. Bartels of the Eastern District of New York on November 24, 1975. On December 2, 1975 both again appeared before Judge Bartels for the purpose of fixing trial dates. Mauro's trial was set for March 17, 1976 and Fusco's trial was set for February 4, 1976. Judge Bartels ordered the defendants back to state custody because of overcrowded conditions at the Metropolitan Correctional Center. On March 2 and April 14, 1976 respectively, writs of habeas corpus ad prosequendum were again issued for Fusco and Mauro who were produced on April 29 and April 26, 1976. Prior to their appearance each defendant had separately moved for dismissal of his indictment on the ground that the United States had violated Article IV(e) of the Interstate Agreement on Detainers since they had been returned to state custody without having first been tried on the federal indictments. On May 17, 1976, Judge Bartels granted Mauro's motion, and on May 19, 1976, he granted Fusco's motion, dismissing both indictments.

States District Court

N DISTRICT OF NEW YORK

IMERLE,

Petitioner,

-v-

STATES OF AMERICA,

Respondent.

AFFIDAVIT

76 Civ. 4277

76 Civ. 5669

. FISKE, JR.

United States Attorney
Attorney for USA

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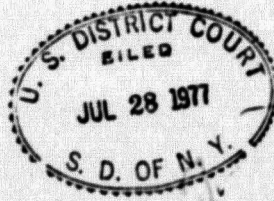
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Attorney for

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*The motion is denied. For policy reasons,
the issues raised by this motion can best be
disposed of by the Court of Appeals.*

SO ORDERED



Rmont C. Carter

U.S. D. J.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2048

HAROLD EDWARDS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX
FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
POINT I—The Decision of the Court in <i>United States v. Mauro</i> , 544 F.2d 588 (2d Cir. 1976), Was Incorrect	4
POINT II—This Court's Decision in <i>United States v. Mauro</i> Should Not Be Applied Retroactively ...	6
POINT III—A Violation of Article IV of the Agreement Is Not Cognizable Under 28 U.S.C. Section 2255	13
POINT IV—Edwards' Plea of Guilty Waived Whatever Rights He Otherwise Might Have Had Under the Agreement	19
POINT V— <i>United States v. Mauro</i> Does Not Compel Dismissal of the Indictment in This Case	22
A. Edwards' Brief Appearances in Federal Court for Arraignment, Plea and Sentence, While an Inmate At Riker's Island, Are Not Substantial Enough to Invoke the Terms of the Agreement	23
B. Edwards Was Not "Serving a Term of Imprisonment" At the Time He Was Returned to State Custody and Is Therefore Not Entitled to the Benefits Conferred by Article IV of the Agreement	25
CONCLUSION	27
APPENDIX:	
Docket Entries	1a

TABLE OF CASES

<i>Alfano v. United States</i> , 555 F.2d 1128 (2d Cir. 1977)	13, 14, 18, 19
<i>Bailey v. Holley</i> , 530 F.2d 169 (7th Cir. 1976) ...	8
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	16
<i>Bistram v. United States</i> , 253 F.2d 610 (8th Cir. 1958)	14, 21
<i>Brady v. United States</i> , 397 U.S. 742 (1970)	21
<i>Davis v. United States</i> , 411 U.S. 233 (1973)	19
<i>Davis v. United States</i> , 417 U.S. 333 (1974)	13, 15, 16, 17, 18
<i>Del Vecchio v. United States</i> , Dkt. No. 76-2165, slip op. 3719 (2d Cir., May 24, 1977)	17, 18, 19
<i>Desist v. United States</i> , 394 U.S. 244 (1969) ..	7, 8, 9
<i>Dorszynski v. United States</i> , 418 U.S. 424 (1974) ..	9
<i>Eisen v. Carlisle & Jacquelin</i> , 479 F.2d 1005 (2d Cir. 1973), <i>aff'd</i> , 417 U.S. 156 (1974)	6
<i>Enright v. United States</i> , 77 Civ. 449 (S.D.N.Y. July 15, 1977)	14, 15
<i>Ferguson v. United States</i> , 513 F.2d 1011 (2d Cir. 1975)	11
<i>Frisbie v. Collins</i> , 342 U.S. 519 (1952)	14
<i>Gates v. Henderson</i> , Dkt. No. 76-2065, slip op. 1345 (2d Cir., January 12, 1977), <i>vacated en banc on other grounds</i> , slip op. 5361 (August 19, 1977)	11
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	14
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	7

	PAGE
<i>Gosa v. Mayden</i> , 413 U.S. 665 (1973)	9
<i>Grosso v. United States</i> , 390 U.S. 62 (1968)	7
<i>Halliday v. United States</i> , 394 U.S. 831 (1969) ...	7, 9
<i>Hankerson v. North Carolina</i> , 45 U.S.L.W. 4717 (U.S. June 17, 1977)	7
<i>Hill v. United States</i> , 368 U.S. 424 (1962) .	13, 14, 17, 18
<i>In re Winship</i> , 397 U.S. 358 (1970)	7
<i>Ivan v. New York</i> , 407 U.S. 203 (1972)	7
<i>Jackson v. United States</i> , 510 F.2d 1335 (10th Cir. 1975)	9
<i>Johnson v. New Jersey</i> , 384 U.S. 719 (1966)	8, 10
<i>Ker v. Illinois</i> , 119 U.S. 346 (1886)	14
<i>King v. United States</i> , 492 F.2d 1337 (7th Cir. 1974)	8
<i>Krilich v. United States</i> , 502 F.2d 680 (7th Cir. 1974), cert. denied, 420 U.S. 992 (1975)	9
<i>LaFever v. United States</i> , 257 F.2d 271 (7th Cir. 1958)	20
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965)	8
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968) ...	7
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969) ..	9
<i>McConnell v. Rhay</i> , 393 U.S. 2 (1968)	7
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970)	21
<i>Mempa v. Rhay</i> , 389 U.S. 128 (1967)	7
<i>Michigan v. Payne</i> , 412 U.S. 47 (1973)	8, 10, 11
<i>Mower v. Britton</i> , 504 F.2d 396 (10th Cir. 1974) ...	8
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975)	7

<i>Owens v. United States</i> , 383 F. Supp. 780 (M.D. Pa. 1974), <i>aff'd</i> , 515 F.2d 507 (3rd Cir. 1975), <i>cert. denied</i> , 423 U.S. 996 (1976)	8, 9
<i>Parker v. North Carolina</i> , 397 U.S. 790 (1970) ...	21
<i>Pickelsimer v. Wainwright</i> , 375 U.S. 2 (1963)	7
<i>Pon v. United States</i> , 168 F.2d 373 (1st Cir. 1948)	15
<i>Rice v. Beto</i> , 420 F.2d 863 (5th Cir. 1969), <i>cert. denied</i> , 398 U.S. 910 (1970)	20
<i>Ridgeway v. United States</i> , Dkt. No. 76-2145 (6th Cir., July 13, 1977)	5
<i>Robinson v. Neil</i> , 409 U.S. 505 (1973)	7
<i>Santana v. United States</i> , 477 F.2d 721 (2d Cir. 1973)	21
<i>Simmons v. United States</i> , 354 F. Supp. 1383 (N.D. N.Y. 1973)	20
<i>Speed v. United States</i> , Dkt. No. 77-1126 (8th Cir., <i>sub judice</i>)	5
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	18
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967)	7, 8, 9
<i>Sunal v. Large</i> , 332 U.S. 174 (1947)	18
<i>Tollett v. Henderson</i> , 411 U.S. 258 (1973)	21
<i>Traber v. United States</i> , 466 F.2d 583 (5th Cir.), <i>cert. denied</i> , 409 U.S. 1044 (1972)	20
<i>United States v. Adkins</i> , Dkt. No. 76-3526 (9th Cir., <i>sub judice</i>)	5
<i>United States v. Alessi</i> , 544 F.2d 1139 (2d Cir. 1976)	5
<i>United States v. Beckerman</i> , 516 F.2d 905 (2d Cir. 1975)	5, 6
<i>United States v. Brackett</i> , — F.2d —, 21 Crim. L. Rep. 2391 (D.C. Cir. July 18, 1977) (<i>en banc</i>)	8

<i>United States v. Brown</i> , — F. Supp. — 76 Cr. 244 (S.D.N.Y. July 15, 1976)	12
<i>United States v. Chico</i> , Dkt. No. 77-1016, slip op. 4275 (2d Cir., June 20, 1977)	13, 22, 23, 24
<i>United States v. Culotta</i> , 413 F.2d 1343 (2d Cir.), cert. denied, 396 U.S. 1019 (1969)	25
<i>United States v. Cumberbatch</i> , Dkt. No. 77-1070 (2d Cir., argued June 9, 1977)	6, 13
<i>United States v. Cyphers</i> , Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977)	6, 13, 19
<i>United States v. Donohoe</i> , 458 F.2d 237 (10th Cir.), cert. denied, 409 U.S. 865 (1972)	20
<i>United States v. Evans</i> , 555 F.2d 561 (2d Cir. 1977), aff'g 423 F. Supp. 528 (S.D.N.Y. 1976)	13
<i>United States v. Ford</i> , 550 F.2d 732 (2d Cir. 1977), petition for cert. filed, 46 U.S.L.W. (July 8, 1977)	4, 5, 6, 13, 15, 16, 20
<i>United States v. Gigante</i> , 531 F.2d 502 (2d Cir. 1976)	18
<i>United States v. Guarino</i> , Dkt. No. 77-1127 (2d Cir., presently pending on submission)	13
<i>United States v. Journet</i> , 544 F.2d 633 (2d Cir. 1976)	19
<i>United States v. Kaylor</i> , 491 F.2d 1133 (2d Cir. 1974) (<i>en banc</i>)	8, 13
<i>United States v. Kenaan</i> , Dkt. No. 77-1014 (1st Cir. July 7, 1977)	5
<i>United States v. Lee</i> , — F.Supp. — 76 Cr. 552 (S.D.N.Y. August 16, 1976)	12
<i>United States v. Liquori</i> , 430 F.2d 842 (2d Cir. 1970), cert. denied, 402 U.S. 948 (1971) ...	16, 17

	PAGE
<i>United States v. Loschiavo</i> , 531 F.2d 659 (2d Cir. 1976)	14, 15, 16, 17, 20
<i>United States v. Mauro</i> , 544 F.2d 580 (2d Cir. 1976), petition for cert. filed, 45 L. W. 3765 (May 9, 1977)	3 and <i>passim</i>
<i>United States v. McGrath</i> , Dkt. No. 77-1064, slip op. 4827 (2d Cir., July 19, 1977)	15
<i>United States v. Peltier</i> , 422 U.S. 531 (1975)	7
<i>United States v. Roberts</i> , 548 F.2d 665 (6th Cir. 1977)	23, 25, 26, 27
<i>United States v. Rosenberg</i> , 195 F.2d 583 (2d Cir.), cert. denied, 344 U.S. 838 (1952)	14, 21
<i>United States v. Scallion</i> , 548 F.2d 1168 (5th Cir. 1977)	5
<i>United States v. Sorrell</i> , Dkt. No. 76-1647 (3rd Cir., argued <i>en banc</i> May 2, 1977)	5
<i>United States v. Spada</i> , 331 F.2d 995 (2d Cir.), cert. denied, 379 U.S. 865 (1965)	14, 19
<i>United States v. Travers</i> , 514 F.2d 1171 (2d Cir. 1974)	7, 15, 16, 17
<i>United States v. U. S. Coin & Currency</i> , 401 U.S. 715 (1971)	7
<i>Waller v. Florida</i> , 397 U.S. 387 (1970)	7
<i>Weisser v. Ciccone</i> , 532 F.2d 101 (8th Cir. 1976)	19, 20
<i>Welcome v. Vincent</i> , 549 F.2d 853 (2d Cir. 1977) ..	11

OTHER AUTHORITIES

18 U.S.C. § 2	1, 2
18 U.S.C. § 2113(a)	1

	PAGE
18 U.S.C. § 2113(d)	2
18 U.S.C. § 2518(8)(a)	18
18 U.S.C. § 3231	15
Interstate Agreement on Detainers, 18 U.S.C. App. 2 and <i>passim</i>	
28 U.S.C. § 2241(c)(5)	4, 11
28 U.S.C. § 2255	1 and <i>passim</i>
Administrative Procedure Act, Section 555(e)	8
Uniform Criminal Extradition Act §§ 5 and 18 ..	26, 27
Supreme Court Rule 19(1)(b)	6
F. R. Cr. Pro. Rule 11	9, 17, 18, 19
F. R. Cr. Pro. Rule 12(b)(2)	15
8 Moore's Federal Practice ¶ 11.02[2](a) (Cipes ed.)	20
Wright, <i>Federal Practice and Procedure</i> , § 193 (1969)	15

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2048

HAROLD EDWARDS,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harold Edwards appeals from a memorandum and order filed January 25, 1977, in the United States District Court for the Southern District of New York by the Honorable Charles M. Metzner, United States District Judge, denying Edwards' motion pursuant to Title 28, United States Code, Section 2255, seeking withdrawal of his plea of guilty, vacation of the judgment of conviction entered thereon, and dismissal of the indictment upon which his plea was premised.

Indictment 74 Cr. 592, filed on June 11, 1974, charged Harold Edwards, along with two others, with armed robbery of a bank insured by the Federal Savings and Loan Insurance Corporation. Count One charged all three defendants with bank robbery in violation of Title 18, United States Code, Sections 2113(a) and 2. Count

Two charged them with use of a firearm in connection with the robbery, in violation of Title 18, United States Code, Sections 2113(d) and 2.

On January 8, 1975, Edwards pleaded guilty to Count One of the indictment; on February 20, 1975, he was sentenced to a term of 10 years imprisonment. No appeal was taken from that conviction.

In September 1976, Edwards filed the present motion pursuant to 28 U.S.C. § 2255, making, for the first time, a claim under the Interstate Agreement on Detainers (hereinafter "the Agreement"), 18 U.S.C. App. Judge Metzner denied the motion on January 25, 1977.

Statement of Facts

On June 11, 1974, Edwards and two confederates were indicted for the May 30, 1974, armed robbery of the New York Federal Savings and Loan Association, 1270 Lexington Avenue, New York, New York. At that time a warrant was issued for his arrest. On June 27, 1974, that warrant was lodged as a detainer at the Manhattan House of Detention ("Riker's Island") where Edwards was confined at the time, awaiting trial on state charges.

On December 18, 1974, Edwards was produced in federal court pursuant to a writ of *habeas corpus ad prosequendum* ("writ") at which time an application to vacate the warrant was granted. He was returned to Riker's Island that day.* The writ was adjourned to

* The motion filed in the District Court as well as Edwards' brief in this Court both incorrectly list this date as December 15, 1974, which was a Sunday. Both the docket sheet in the District Court and the writ itself indicate that Edwards was first brought to federal court on December 18, 1974. The docket sheet is included in the Government's appendix.

January 8, 1975 on which date Edwards was again brought before the District Court and pleaded guilty to Count One of the indictment. The writ was then adjourned to February 20, 1975, and Edwards was returned to Riker's Island. On that latter date, the defendant was once again brought to federal court and was sentenced to 10 years imprisonment.* The writ was thereupon marked satisfied.

Nineteen months later, in September 1976, Edwards filed the present motion pursuant to 28 U.S.C. § 2255, seeking to set aside and vacate his sentence, to withdraw his guilty plea and to dismiss the indictment against him. The motion was based entirely on the Agreement. Edwards argued that under this Court's decision in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3765 (May 9, 1977), his transfer from state to federal custody and back again prior to his federal guilty plea violated Article IV(e) of the Agreement. On January 25, 1977, Judge Metzner denied the motion without a hearing.** Judge Metzner ruled that since Edwards had pleaded guilty to the indictment, he had waived all defects in the indictment, including any possible vulnerability to challenge under the Agreement.

* The federal sentence was to run concurrently with a sentence imposed in state court on February 13, 1975, (that is, between the time of Edwards' guilty plea and the time of his sentence in this case) of two to four years for possession of a weapon.

** A copy of his memorandum opinion is attached to Edwards' brief on this appeal.

ARGUMENT

POINT I

The Decision of the Court in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), Was Incorrect.

In *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3765 (May 9, 1977), which the majority noted was a case "of first impression," *id.* at 589, a divided panel of this Court ruled for the first time in any Court of Appeals that, in effect, when the Government utilized the literally centuries-old writ of *habeas corpus ad prosequendum* to produce defendants in Court, it was bound by the provisions of Article IV of the Agreement, notwithstanding the fact that neither the Agreement nor its legislative history even once mentions the writ or provides for a repealer of 28 U.S.C. § 2241(c)(5). The Government submits that the decision in *Mauro* was wrong.* The arguments

* Were this Court to overrule *Mauro*, Edwards' motion would necessarily be without merit. We recognize, of course, that this case is distinguishable from *Mauro* in one respect. In *Mauro*, no detainer was filed against the defendants. The *Mauro* majority purported to rule only that a writ is a "detainer," and did not explicitly reach the issue of whether a writ is a "request" within the meaning of Article IV. In this case, as in *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. (July 8, 1977), a detainer was filed. Thus, based upon the language in *Ford* that "[w]hether the writ independently constitutes a detainer, therefore, is not at issue here," *id.* at 736, see also *id.* at 742, one might argue that this case is governed by *Ford* irrespective of the validity of *Mauro*.

This argument is incorrect, however, for the following reason. The characterization of a writ as a "detainer" is not a sufficient condition for the applicability of Article IV of the Agreement. Unlike Article III, which governs requests initiated by the defend-

[Footnote continued on following page]

in support of our position are generally those advanced by Judge Mansfield in his dissent in *Mauro*, 544 F.2d at 595, and we will not repeat them here. We do point out, however, that since the decision in *Mauro*, the Courts of Appeal for the First, Fifth and Sixth Circuits have considered the issue reached in *Mauro* and have each rejected the reasoning adopted in that decision. See *Ridge-way v. United States*, Dkt. No. 76-2145 (6th Cir. July 13, 1977); *United States v. Kenaan*, Dkt. No. 77-1014 (1st Cir. July 7, 1977); *United States v. Scallion*, 548 F.2d 1168 (5th Cir. 1977).^{*} In short, this Court now stands absolutely alone in its interpretation of the Agreement. In view of the enormous precedential and practical significance of *Mauro* and its progeny, we respectfully urge the panel that hears this appeal to reconsider the correctness of the *Mauro* decision. See, e.g., *United States v. Alessi*, 544 F.2d 1139, 1143-52 (2d Cir. 1976 (reconsidering *United States v. Beckerman*, 516 F.2d 905 (2d

ant and is triggered solely by the pendency of a "detainer," Article IV is triggered by a "request for temporary custody or availability," which is filed by the Government. In order to reach its result that dismissal was required by Article IV(e), the majority in *Mauro* must necessarily but *sub silentio* have decided that a writ constitutes a "request;" indeed, the *Ford* panel recognized this when it read the *Mauro* decision as holding "that the writ of habeas corpus ad prosequendum constitutes a 'detainer' and a 'request' by a prosecuting authority within the meaning of the Act..." 550 F.2d at 736. (emphasis added).

Hence, if *Mauro* was wrongly decided, Article IV does not apply to Edwards; otherwise put, Edwards' position depends upon the continued vitality of *Mauro*.

^{*} Each of these decisions rejected *Mauro* and held that a writ is not a detainer under the Agreement. The Third Circuit, in *United States v. Sorrell*, Dkt. No. 76-1647 (3d Cir. November 29, 1976), reached the same result reached by this Court in *Mauro*. However, that decision was vacated on January 27, 1977, and was argued before the Third Circuit *en banc* on May 2, 1977. The issue is currently also before the Ninth Circuit in *United States v. Adkins*, Dkt. No. 76-3526 and the Eighth Circuit in *Speed v. United States*, Dkt. No. 77-1126.

Cir. 1975)). Alternatively, we urge this Court to consider *en banc* the correctness of *Mauro* and its progeny. Unlike the situation in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020 (2d Cir. 1973) (Kaufman, C.J.) (denying rehearing *en banc*), *aff'd*, 417 U.S. 156 (1974), were this Circuit to overrule *Mauro* and bring itself into line with the other Circuits that have ruled on the question, there is no reason to be "confident the Supreme Court will take this matter under its certiorari jurisdiction." *Id.* at 1020. Rather, were this Court to reach unanimity among the Circuits, the principal ground for a grant of certiorari, see Rule 19(1)(b) Supreme Court Rules, would no longer exist, and the Supreme Court need not hear the issue. We submit that the "exercise of sound, prudent and resourceful judicial administration," *id.* at 1021, commends this action.

POINT II

This Court's Decision in *United States v. Mauro* Should Not Be Applied Retroactively.

This Court in *United States v. Mauro*, *supra*, ruled for the first time in any court of appeals that the Agreement limited the Government's ability to procure state prisoners under a writ of *habeas corpus ad prosequendum*. Subsequently, in two decisions in which the Government's briefs were filed before the filing of the *Mauro* decision, the Court has reaffirmed its holding in *Mauro*. *United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977); *United States v. Ford*, *supra*, 550 F.2d at 736.* This Court has not, however, had occasion to address the fundamental issue of whether its

* The issue of the retroactive effect of *Mauro* was raised in *United States v. Cumberbatch*, Dkt. No. 77-1070 (2d Cir., argued June 9, 1977), which is presently *sub judice*.

novel interpretation of the Agreement should be applied to transfers that antedated *Mauro* and that occurred at a time when literally no one ever considered that the Government's centuries-old power to proceed by a writ was somehow limited.

In numerous decisions concerning the possible retroactivity of its prior decisions, the Supreme Court has routinely granted full retroactive effect only in two situations: where the new decision relates to an "aspect of the criminal trial that substantially impairs its truth-finding function," *United States v. Peltier*, 422 U.S. 531, 535 (1975),* and where the conduct that is the subject of the indictment was found under the prior decision to be "constitutionally immune from punishment." ** In other situations, the Supreme Court has adopted a three-pronged test based upon (1) the purpose to be served by the new decision; (2) the extent of reliance upon the previous law by the Government; and (3) "the effect on the administration of justice of a retroactive application of the new decision." *Halliday v. United States*, 394 U.S. 831, 832 (1969); *Desist v. United States*, 394 U.S. 244, 249 (1969); *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Each

* See, e.g., *Hankerson v. North Carolina*, 45 U.S.L.W. 4717 (U.S. June 17, 1977) (*Mullaney v. Wilbur*, 421 U.S. 684 (1975) applied retroactively); *Ivan v. New York*, 407 U.S. 203 (1972) (*In re Winship*, 397 U.S. 358 (1970) applied retroactively); *McConnell v. Rhay*, 393 U.S. 2 (1968) (giving retroactive effect to the right to counsel provided in *Mempa v. Rhay*, 389 U.S. 128 (1967)); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (retroactive effect of *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

** See, e.g., *Robinson v. Neil*, 409 U.S. 505 (1973) (giving retroactive effect to *Waller v. Florida*, 397 U.S. 387 (1970)); *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971) (*Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), applied retroactively). See also *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974).

of these factors clearly demonstrates that *Mauro* should not be applied retroactively.*

* Most of the decisions cited in support of the three-pronged approach involved the possible retroactive application of new constitutional procedural decisions, and indeed the doctrine of prospectivity received its genesis—or at least its impetus—from the Supreme Court's early decisions involving the exclusionary rule. See e.g., *Linkletter v. Walker*, 381 U.S. 618, 629 (1965); *Johnson v. New Jersey*, 384 U.S. 719 (1966). Nonetheless, the retroactivity analysis of these cases is fully applicable to *Mauro*. First, the decision in *Mauro* was not simply an interpretation of the Agreement, since even if the Agreement were read to apply to the federal Government, that would not in itself deal with the problem of the Government's independent power acting under a writ. The conclusion of the *Mauro* majority limiting the Government's age-old power under a writ was based on its reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement." 544 F.2d at 592. This, of course, was essentially a prophylactic determination of precisely the sort to which the retroactivity analysis most directly applies, *Michigan v. Payne*, 412 U.S. 47, 53 (1973). At any rate, the applicability of this analysis to interpretation of statutes, even when the predicate decision did not "overrule" a prior judicial determination, was made explicitly clear by this Court's unanimous, *en banc* decision in *United States v. Kaylor*, 491 F.2d 1133, 1138-39 (2d Cir. 1974) (*en banc*), applying its interpretation of the Youth Corrections Act prospectively only, and specifically employing the *Desist* and *Stovall* tests. Similarly, in *Bailey v. Holley*, 530 F.2d 169, 172-74 (7th Cir. 1976), a defendant sought to take advantage of the Circuit's earlier decision in *King v. United States*, 492 F.2d 1337 (7th Cir. 1974), that section 555(e) of the Administrative Procedure Act applied to the United States Board of Parole. Acknowledging that *Bailey* was in precisely the same situation as *King*, the Court nonetheless ruled that the *King* decision would be prospectively applied only. In doing so the Court specifically rejected "petitioner's contention that the *Stovall* criteria for deciding questions of retroactivity are not applicable to decisions based on statutory construction." *Id.* at 173. See also *Mower v. Britton*, 504 F.2d 396, 399 (10th Cir. 1974). Other circuits have ruled similarly. See, e.g., *United States v. Brackett*, — F.2d —, 21 Crim. L. Rep. 2391 (D.C. Cir. July 18, 1977) (*en banc*); *Owens v. United States*, 383 F. Supp.

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Turning first to the purpose to be served by the new decision, the purposes of the Agreement as set forth in Article I are to avoid "uncertainties which obstruct programs of prisoner treatment and rehabilitation," and to promote "expeditious and orderly disposition" of outstanding charges and "cooperative procedures" in dealing with interjurisdictional transfer of prisoners. None of these policies, which at any rate have nothing to do with the "truth-finding process," *Gosa v. Mayden*, 413 U.S. 665 (1973) (plurality opinion), would be furthered by retroactive application. Edwards' "programs of prisoner treatment and rehabilitation" (if indeed he was participating in any during his pre-trial confinement at Riker's Island) were in no way hampered by his very brief visit to the federal courthouse. "Cooperative procedures" were certainly unnecessary in view of the acknowledged acquiescence of the New York state authorities in the authority of the federal writ and the efficient transfer of custody which permitted Edwards to be transferred from state to federal custody for a court appearance and returned to

780, 785-87 (M.D. Pa. 1974), *aff'd*, 515 F.2d 507 (3rd Cir. 1975), *cert. denied*, 423 U.S. 996 (1976); and *Jackson v. United States*, 510 F.2d 1335 (10th Cir. 1975) (Supreme Court's interpretation of Youth Corrections Act in *Dorszynski v. United States*, 418 U.S. 424 (1974), to be applied prospectively only); *Krilich v. United States*, 502 F.2d 680, 683 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (Prior decision holding that Special Agent's Report on tax prosecution was a "statement" under the Jencks Act to be applied prospectively only). Indeed, the Supreme Court itself has afforded prospective applicability to its prior interpretation of written law. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Court held that in the absence of strict compliance with Rule 11 of the Federal Rules of Criminal Procedure a guilty plea must be vacated. Although, as a concurring justice noted, the decision "merely interpreted Rule 11 . . . and held that the rule must be strictly applied according to its terms," *Halliday v. United States*, *supra*, 394 U.S. at 834 (Harlan, J., concurring, the Court held that it would be applied prospectively only, *id.* at 832-33, explicitly following the three-pronged test of *Desist* and *Stovall*.

state custody—all within a few hours. And Edwards' interest in an "expeditious and orderly" processing of his charges was surely satisfied by the unusually expeditious manner in which his particular case was handled, and in general was more than adequately protected by the Sixth Amendment and the local speedy trial rules *.

The second prong of the retroactivity test is the reliance of law enforcement authorities on prior law. It is simply incontestable that every party to Edwards' transfer from Riker's Island to Foley Square considered that the Federal Government was validly proceeding on the strength of a writ of *habeas corpus* with none of the limitations added by the Agreement. The Federal Government did not make a "request" required by the Agreement or follow any of the procedures required by the Agreement.** Indeed, our surprise at the contentions eventually adopted in *Mauro* has been self-evident. Edwards, unlike the defendants in *Mauro*, who raised the issue *promptly* and *pretrial*, never asserted any claim under, or made any mention of, the Agreement until the filing of his petition under 28 U.S.C. § 2255. In short, he simply seeks to reap a "windfall benefit," *Michigan v.*

* The Supreme Court has noted that in determining possible retroactive effect, it will also look to whether "other safeguards are available" to protect the right asserted. *Johnson v. New Jersey*, *supra*, 384 U.S. at 728.

** For example, the parties to the Agreement have developed common forms that are required for the processing of claims under the Agreement. These standardized documents, consecutively numbered Form I through Form IX, cover all aspects of the procedures under the Agreement, from "Notice of Untried Indictment" to be sent to a prisoner (Form I) through "Prosecutor's Report on Disposition of Charges" (Form IX). During the course of Edwards' proceedings, no one ever used such a form. While we do not contend that the use of such forms is a prerequisite to assertion of rights under the Agreement, but see Article VII, their non-use, we submit, is powerful evidence that no one at that time considered that the Agreement applied.

Payne, 412 U.S. 47, 53 (1973), from a retroactive application of *Mauro*. Finally, the state of New York, even if one were to assume that it had an interest in the disposition of Edwards' petition, clearly did not consider the Federal Government limited by the Agreement, since it never once required compliance with the procedures contemplated by the Agreement.* In short, *all* parties to this matter treated the manner in which Edwards was brought to the federal courthouse as nothing more nor less than the Federal Government's exercise of its power under Title 28, United States Code, Section 2241(c)(5). Furthermore, we submit that this reliance was entirely justified. The *Mauro* court noted that its decision that the Agreement applied to the Federal Government was "one of first impression in this Court." 544 F.2d at 589.** Indeed, while the majority in *Mauro* concluded that a writ constituted a "request" under the Agreement, its principal basis for doing so—the assertion that "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ," 544 F. 2d at 592 (footnote omitted)—ignores the fact that the defendant under Article III(a) can *himself* trigger the applicability of the Agreement. In any event, even if the *Mauro* majority's fear of circum-

* Those procedures include both the use of the forms described on page 10, *supra*, at ** and the 30-day opportunity of the Governor to review the "request" under Article IV(a).

** Thus, the *Mauro* decision should not be applied retroactively as are decisions that merely "clarify or extend" prior law. *Gates v. Henderson*, Dkt. No. 76-2065, slip op. 1345, 1349 n. 2 (2d Cir., January 12, 1977), vacated *en banc on other grounds*, slip opfl 536i (August 19, 1977); *Welcome v. Vincent*, 549 F.2d 853, 858 n. 3 (2d Cir. 1977); see also *Ferguson v. United States*, 513 F.2d 1011, 1012 (2d Cir. 1975) (Kaufman, C.J.). As the *Mauro* panel acknowledged, its decision was wholly unprecedented, and thus these decisions are inapplicable. Indeed, in *Ferguson* the Court noted that prospective application was appropriate for new decisions "which conflicted with well-established prior practice." *Id.* That is certainly the situation in this case.

vention. were sound, prospective application of this essentially prophylactic reasoning in *Mauro* is clearly sufficient to cure any alleged ill. Finally, the *Mauro* majority's conclusion, whatever its merits, is not one that could possibly be foreseen by anyone other than the clairvoyant. There is simply *not one scrap* of explicit language or even a hint in either the text of the Agreement or the legislative history behind it that the power of the Federal Government acting under authority of writs was somehow limited.* No clearer case for reliance on prior law could be made.

Finally, of course, "the effect on the administration of justice of a retroactive application" of *Mauro* is clearest of all. It is incontestable that since the accession of the Federal Government to the Agreement in 1970 virtually no one—and certainly no one in this Circuit—asserted any rights under that Agreement with respect to the Federal Government until 1976. Prior to the *Mauro* decision, prisoners appear to have been transferred on a regular basis from state to federal custody and back without regard for the provisions of the Agreement. While there are no statistics, we submit that there are a significant number of prisoners in federal custody whose transfers both antedated the *Mauro* decision and violated the provisions of the Agreement. As word of the *Mauro* decision spreads, many prisoners fortunate enough to have been convicted in a court of the Second Circuit will raise a claim under the Agreement, either directly or, like

* As noted at p. 5, *supra*, the First, Fifth and Sixth Circuits, the only ones that have considered the issue, have explicitly rejected *Mauro*. Moreover, prior to this Court's decision, several judges in the Southern District of New York had also rejected the reasoning of the district court opinion in *Mauro*. See *United States v. Brown*, — F. Supp. — 76 Cr. 244 (S.D.N.Y. July 15, 1976) (Metzner, J.); *United States v. Lee*, — F. Supp. — 76 Cr. 552 (S.D.N.Y. August 16, 1976) (Goettel, J.). No judge in the Southern District had agreed with Judge Bartel's decision in *Mauro* prior to its affirmance. In short, the United States Attorney has not been alone in his reading of the statute.

Edwards, under 28 U.S.C. § 2255.* This prospect is especially frightening when, as here, convictions of defendants who have pleaded guilty to serious crimes are jeopardized—over an issue that has absolutely nothing to do with guilt or innocence.

In short, under the tests developed by the Supreme Court to determine the retroactive effect of a decision, *Mauro* should be applied—if at all—prospectively only.**

POINT III

A Violation of Article IV of the Agreement Is Not Cognizable Under 18 U.S.C. Section 2255.

It is well settled that to warrant collateral review under 28 U.S.C. § 2255, the claimed error must be one of lack of jurisdiction, deprivation of a constitutional right or a fundamental defect resulting in a "complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974), quoting *Hill v. United States*, 368 U.S. 424, 429 (1962); see also *Alfano v. United States*, 555

* This is at least the seventh case to reach this Court raising issues under the Agreement, all in the last year. *Mauro, Ford, United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., February 8, 1977); *United States v. Chico*, Dkt. No. 77-1016, slip op. 4275 (2d Cir., June 20, 1977); *United States v. Cumberbatch, supra*; and *United States v. Evans*, 555 F.2d 561 (2d Cir. 1977), *aff'g* 423 F. Supp. 528 (S.D.N.Y. 1976). See also *United States v. Guarino*, Dkt. No. 77-1127 (presently pending on submission). In addition, there may be appeals from other districts of which we are unaware, and a significant number of cases raising such issues are pending in the district courts.

** In *United States v. Kaylor, supra*, this entire Court noted "great concern lest our burdened federal court system be flooded with new motions to vacate sentences. . . ." 491 F.2d at 1138. That concern must surely arise here *a molto fortiori* when the concern is that the courts will be burdened with attempts by concededly guilty defendants seeking release, and not merely resentencing.

F. 2d 1128 (2d Cir. 1977); *United States v. Spada*, 331 F. 2d 995, 996 (2d Cir.), *cert. denied*, 379 U.S. 865 (1965). The facts of this case fall into none of these categories. No exceptional circumstances are presented here where "the need for [the] remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, *supra*, 368 U.S. at 429.

The District Court in this case certainly had subject matter jurisdiction over Edwards' bank robbery indictment and it obtained personal jurisdiction over him on December 18, 1974, the day he was arraigned on the indictment and his bail was fixed.*

Since the District Court unquestionably had subject matter jurisdiction to accept the guilty plea and to render the judgment of conviction now being collaterally attached,** the inquiry becomes whether the claim raised a

* Edwards' claim that the Court somehow lost personal jurisdiction over him by returning him to Riker's Island on December 18, 1974 is frivolous. The place of his incarceration in no way changed his status. Indeed, as the Supreme Court has recently reiterated, once a defendant is actually before the Court, any illegality in the manner of his being brought there will not vitiate a conviction or deprive the Court of jurisdiction. *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 346 (1886). Moreover, any question as to personal jurisdiction was waived by Edwards' guilty plea on January 8, 1975. *Bistram v. United States*, 253 F.2d 610 (8th Cir. 1958); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

** While in this case Judge Metzner concluded that Edwards had waived his claims by pleading guilty, in a separate matter, also involving invocation for the first time of rights under the Agreement by means of section 2255, Judge Metzner has concluded that a section 2255 motion will lie to claim such rights when the defendant went to trial. In particular, Judge Metzner concluded that an Article IV(e) violation created a "jurisdictional defect" in the indictment, which is thus cognizable on collateral attack under *United States v. Loschiavo*, 531 F.2d 659, 662-63 (2d Cir. 1976). *Enright v. United States*, 77 Civ. 449 (S.D.N.Y.

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July 15, 1977). Judge Metzner has agreed to reconsider his decision upon the filing of further papers by the Government, and the issuance of the writ has been stayed until September 1977.

At any rate, we submit that Judge Metzner's analysis of an Article IV violation as a "jurisdictional defect" is incorrect. The *Loschiavo* decision, upon which he relied, noted only that section 2255 will lie to entertain "claims based upon . . . a lack of jurisdiction, in the broad sense of the court's power to adjudicate the issues . . ." 531 F.2d at 662-63. Since the indictments in both *Enright* and this case concededly stated an offense "against the laws of the United States," then clearly the District Court had "power to adjudicate the issues" under 18 U.S.C. § 3231, regardless of the vulnerability of the indictment to attack. Indeed, as this Court has recently noted, characterizing attacks on indictments as "jurisdictional" will render the requirement that such attacks be made pre-trial "a nullity." *United States v. McGrath*, Dkt. No. 77-1064, slip op. 4827, 4832 n.5 (2d Cir., July 19, 1977).

This limited interpretation of the notion of "jurisdictional defect" is simply compelled by the wording of F.R. Crim. P. 12(b)(2), which provides that defenses and objections based upon defects in the indictment are waived if not made prior to trial, other than claims that "it fails to show jurisdiction in the court or to charge an offense. . . ." As commentators have noted, see Wright, *Federal Practice and Procedure*, § 193 at 404-06 (1969), this exception has been rigorously distinguished from claims that attack only the validity of the indictment. Furthermore, the decisions in *Davis* and *Loschiavo* are consistent with this position. In both cases, the offense with which the defendant was charged was no longer an offense against the laws of the United States. See also *United States v. Travers*, *supra*. Moreover, if the defect created by a violation of the Agreement were truly jurisdictional, in the broad sense of the court's power to adjudicate, then it would not be waivable. But, as noted in *United States v. Ford*, *supra*:

"This provision [Article IV(e)], however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable." 550 F.2d at 742.

Had the defect alleged in *Ford* been truly jurisdictional, that would have ended the matter, since "the lack of jurisdiction referred to in [F.R. Crim. P. 12 (b)(2)] obviously refers to jurisdiction over subject matter, which a defendant has no power to waive." *Pon v. United States*, 168 F.2d 373, 374 (1st Cir. 1948).

substantial constitutional issue. The answer, clearly, is that it did not. A violation of Article IV(e) does not involve a substantial constitutional issue, or indeed *any* constitutional issue. The right is merely a statutory one, having no constitutional derivation or nexus. Specifically, Edwards made no showing and, indeed, could have made no showing) of prejudice to or loss of any rights under the Fifth or Fourteenth Amendments. Rather, his best interests as a state prisoner were clearly and carefully safe-guarded. He was permitted to continue in whatever programs may have been conducted by the state institution, and suffered no hardship in traveling due to the close proximity of the federal courthouse. In short, his "return" to state custody did not "significantly impede the development of a coherent program for the prisoner's punishment and rehabilitation." *United States v. Ford*, 550 F. 2d at 739. Rather, it furthered that goal.*

Finally, any claim that there was a "fundamental defect which inherently results in a complete miscarriage of justice," *Davis v. United States*, *supra*, must also fail. While this Court has held collateral relief warranted as a result of an intervening change in law regarding the underlying offense, *United States v. Loschiavo*, *supra*; see also, *United States v. Travers*, *supra*; *United States v. Liguori*, 430 F.2d 842 (2d Cir. 1970), *cert. denied*,

* Edwards makes no claim that his rights under Article IV(c) of the Agreement were violated or, that he was denied a speedy trial. Indeed, his case was disposed of swiftly, well within the structures of *Barker v. Wingo*, 407 U.S. 514 (1972), the local speedy trial rules then in effect (the Government filed its Notice of Readiness for Trial on December 18, 1974, the day of Edwards' arraignment), and the 120-day period provided for in Article IV(c) of the Agreement.

402 U.S. 948 (1971), under none of these decisions, or under *Davis*, is Edwards entitled to relief.*

This Court's decision in *Mauro*, even if considered an intervening change in law, does not result in imprisoning Edwards for "something that was not a criminal offense," 531 F. 2d at 665. His conduct constitutes a federal criminal offense despite the interpretation given to the Agreement by the *Mauro* panel. Accordingly, there would be no miscarriage of justice in denying collateral relief under Section 2255. *Hill v. United States, supra*.

Two recent decisions of this Court demonstrate the limited availability of relief under Section 2255, as opposed to direct review. In *Del Vecchio v. United States*, Dkt. No. 76-2165, slip op. 3719 (2d Cir., May 24, 1977), this Court considered whether Section 2255 affords relief to a defendant who attacked his guilty plea because of a technical failure to comply with the provisions of Rule 11 of the Federal Rules of Criminal Procedure. The Court held that in spite of the District Court's failure to advise Del Vecchio of his ineligibility for parole in the event of conviction,—which would automatically render his plea vulnerable on direct review under *Michel v. United States*, 507 F.2d 461 (2d Cir. 1974)—his conviction would not be set aside on collateral attack. After a thorough review

* In both *Davis* and *Loschiavo*, the concern was with a change in the law subsequent to the affirmance of the respective convictions which, if available to Davis and Loschiavo, would have completely exonerated them. For example, the intervening change in law meant the Loschiavo "was being imprisoned for something that was not a federal criminal offense." 531 F.2d at 665. In *Davis*, due to the intervening change in the law it was possible, if his contention was correct, that his "conviction and punishment are for an act that the law does not make criminal." 417 U.S. at 346. These were truly situations which would inherently result "in a complete miscarriage of justice." Similarly, in *Travers*, the conduct of which Travers stood convicted no longer constituted a federal offense.

of the standard to be applied in Section 2255 cases under *Davis*, the Court concluded that to obtain relief under Section 2255 for noncompliance with Rule 11 in the making of the plea "a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea." Slip op. at 3728.

Similarly, in *Alfano v. United States, supra*, the Court held that Section 2255 relief would not be granted to set aside a conviction for failure to comply with the rule enunciated in *United States v. Gigante*, 531 F.2d 502 (2d Cir. 1976), that a violation of the sealing requirements of 18 U.S.C. § 2518(8)(a) automatically requires suppression, even absent any claim of tampering. The Court, quoting *Stone v. Powell*, 428 U.S. 465, 477 n. 10 (1976), again set forth the standard to be applied in determining whether an error of law may be raised in a Section 2255 proceeding.

The writ of habeas corpus and its federal counterpart 28 U.S.C. § 2255, "will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). For this reason, nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings. *Id.*, at 178-179; *Davis v. United States*, 417 U.S. 333, 345-346 and n. 15 (1974). Even those nonconstitutional claims that could not have been asserted on direct appeal can be raised on collateral review only if the alleged error constituted "a fundamental defect which inherently results in a complete miscarriage of justice," *id.*, at 346, quoting *Hill v. United States*, 368 U.S. 424, 428, (1962).

555 F.2d at 1130. It then ruled that unlike the "automatic" rule that applies on direct review, when proceeding by a § 2255 motion a defendant must show actual prejudice. *Id.* Edwards, of course, has not come close to meeting this exacting standard. Edwards was neither

prejudiced by his return to state custody, nor was the integrity of the fact finding process affected by his transfer. He entered a plea of guilty, and was sentenced on that plea. Now, belatedly asserting a claim of procedural error, he is neither protesting his innocence, nor claiming any deprivation of due process in determining his guilt, and he does not and cannot allege any actual prejudice. Indeed, in this respect his claims are far weaker than those found insufficient in *Del Vecchio* and *Alfano*. Surely, without more, a claim such as this does not merit review under 28 U.S.C. § 2255.*

POINT IV

Edwards' Plea of Guilty Waived Whatever Rights He Otherwise Might Have Had Under the Agreement.

The law is clear that "a plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects." *United States v. Spada, supra*, 331 F.2d at 996. See generally *Weisser v. Ciccone*, 532

* This Court's decision in *United States v. Cyphers*, Dkt. No. 76-1131, slip. op. 1737 (2d Cir., February 8, 1977), does not require a different result. In *Cyphers*, a divided Court held that a claim under Article IV(e) of the Agreement could be raised, for the first time, on direct appeal of a conviction. While the Government continues to believe that the *Cyphers* decision (in which the Solicitor General has determined to seek *certiorari* and will shortly file a petition in the Supreme Court) is wholly inconsistent with *Davis v. United States*, 411 U.S. 233 (1973), it is nevertheless distinguishable, since the question of whether relief could be obtained under 28 U.S.C. § 2255 was neither posed nor considered. By way of analogy, in *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976), this Court held that any violation of F.R. Crim. P. 11 rendered a guilty plea vulnerable to attack on direct appeal, even though the defendant never raised the issue in the District Court. In contrast as we have discussed, similar claims were found insufficient on collateral attack in *Del Vecchio v. United States, supra*.

F.2d 101, 104 (8th Cir. 1976); *Traber v. United States*, 466 F.2d 483 (5th Cir.) (Per Curiam), *cert. denied*, 409 U.S. 1044 (1972); *Rice v. Beto*, 420 F.2d 863, 865 (5th Cir. 1969), *cert. denied*, 398 U.S. 910 (1970); *United States v. Donohoe*, 458 F.2d 237, 239, n. 3 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972); *LaFever v. United States*, 257 F.2d 271, 272 (7th Cir. 1958); *Simmons v. United States*, 354 F. Supp. 1383, 1388-89 (N.D.N.Y. 1973). It is equally clear that jurisdictional defects, that is, defects in the Court's subject matter jurisdiction, 8 Moore's Federal Practice ¶ 11.02[2][a] (Cipes ed.), cannot be waived.

In *United States v. Ford*, *supra*, this Court considered whether a claimed right to a dismissal of an indictment on the basis of an alleged return to state custody in violation of Article IV(e) was waivable. In holding that the claim was waived Judge Mansfield explained.

"This provision, however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable."

550 F.2d at 742. Had the defect alleged in *Ford* been jurisdictional "in the broad sense of the court's power to adjudicate," *United States v. Loschiavo*, *supra*, 531 F.2d at 662-63 it could not have been waived, and there would have been no need for the Court to go on to consider the additional claims made under Article IV(c) of the Agreement. *Ford*, therefore, clearly demonstrates that a violation of Article IV(e) does not deprive the Court of subject matter jurisdiction.*

* Edwards characterizes his challenge as relating to the District Court's personal jurisdiction over him after he returned to

[Footnote continued on following page]

The remaining question here too, then, is whether there was another kind of defect based on the Agreement so serious as to require vacation of a guilty plea, long after it was made. Judge Metzner concluded that there was not; in this he was clearly correct.

In particular, Edwards' argument that his failure to fully understand the application of the Agreement to his case undercut the voluntariness of his plea is simply not correct. The rule that a plea must be intelligently made to be valid does not mean that a plea is vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. When the defendant waives his remedies and admits his guilt, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. *Brady v. United States*, 397 U.S. 742, 757 (1970); *McMann v. Richardson*, 397 U.S. 759, 774 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970);* see also *Santana v. United States*, 477 F.2d 721 (2d Cir. 1973).

Riker's Island on December 18, 1974. But as noted, p. 14 *supra* at *, his claim is not only incorrect as a matter of law, but is precisely the species as claim that has been held to be waived by the entry of a guilty plea. *Bistram v. United States*, *supra*; *United States v. Rosenberg*, *supra*.

* *Parker v. North Carolina* directly controls this case. There, a defendant attempted to demonstrate after his plea of guilty that the grand jury that indicted him had been unconstitutionally composed. Although, had he been correct, the indictment would have been a nullity, the Supreme Court held that his plea of guilty barred any subsequent challenge to the validity of the indictment. 397 U.S. at 798-99. This holding was reaffirmed and extended in *Tollett v. Henderson*, 411 U.S. 258 (1973), in which the Court held that a guilty plea barred an attack on grand jury composition even where the unconstitutional composition of the grand jury was conceded, *id.* at 259, and where the defendant was never aware of either those facts or his rights and thus could not make a "knowing and intelligent waiver." *Id.* at 266-67.

Edwards should have asserted his claim under the Agreement during the period prior to the date of his guilty plea. Having failed to raise an issue which this Court has determined to be waivable, he is bound by that waiver.

POINT V

***United States v. Mauro* Does Not Compel Dismissal of the Indictment in This Case.**

Even assuming the continued vitality of *Mauro* and its retroactive application to a case involving collateral attack of a guilty plea, the Agreement does not require the dismissal of the indictment in this case. Edwards alleges that he was taken to federal court in Foley Square from Riker's Island pursuant to a writ on three occasions—for arraignment, plea and sentence.* In each case he was promptly returned to Riker's Island. This case, therefore, falls squarely within the exception to *Mauro* noted by *United States v. Chico*, Dkt. No. 77-1016, slip op. 4275 (2d Cir., June 20, 1977) which applies in cases where "a prisoner is removed from the prison of a state for a few hours to be arraigned, plead and be sentenced in the federal court without ever being held at any place of imprisonment other than that of the sending state and without interruption of his rehabilitation there." Slip op. at 4280. In addition, it appears from the record that on the two occasions that Edwards alleges he was returned to Riker's Island prior to the imposition of sentence on the federal charge (December 18, 1974 and January 8, 1975) he was being held there awaiting trial and was not "serving a term of imprisonment." It is only when the de-

* Though Edwards does not make the allegation, the record of the District Court proceedings in 74 Cr. 592 discloses that Edwards was also brought from Riker's Island on December 23,

[Footnote continued on following page]

fendant against whom a detainer is lodged is serving such a sentence that Article IV of the Agreement is triggered, and only under those circumstances that he is entitled to the benefit of its provisions. *United States v. Roberts*, 548 F.2d 665, 670 (6th Cir. 1977).

A. Edwards' Brief Appearances in Federal Court for Arraignment, Plea and Sentence, While an Inmate At Riker's Island, Are Not Substantial Enough to Invoke the Terms of the Agreement

In *United States v. Chico*, Dkt. No. 77-1016, slip. op. 4275 (2d Cir., June 20, 1977), this Court held that Article IV(e) of the Agreement does not apply in cases where a prisoner is removed from a state institution and returned after a few hours, without being held at any other place of imprisonment.

At the time the defendants in *Chico* were indicted in the District of Connecticut, they were confined in Connecticut state prisons as a result of felony convictions. On three separate occasions, they were brought to federal court pursuant to a writ—for arraignment, for entry of a plea of guilty, and for sentence. After each court appearance they were returned to the same state prisons from which they had been taken. Judge Mansfield, writing for a unanimous panel, concluded that the purposes of the Agreement would not be furthered by applying Article IV in that case because (1) the defendants were never imprisoned by the federal government; (2) their rehabilitation programs at the state penal institution were not interrupted by any other imprisonment; and

1974, for the purpose of conferring with his attorney. This additional trip, presumably made at the request of either Edwards or his attorney, does not alter the *de minimus* nature of Edwards' periods of federal custody or affect the application of *Chico* to this case.

(3) the speedy trial objectives of the Agreement were satisfied since the defendants entered guilty pleas within 120 days following their removal to face the federal charges. Slip op. at 4279-80.

Similarly, in this case, Article IV(e) of the Agreement does not apply. Edwards was confined at Riker's Island throughout the pendency of the federal charges against him;* any rehabilitation program available to Edwards at Riker's Island was not interrupted by a period of federal imprisonment; Edwards' pleaded guilty within three weeks of first being brought to federal court to answer the federal charge. This case is thus in all material respects identical to *Chico*. The decision of the District Court should thus be affirmed on the authority of that recent decision.

* Edwards' brief in this Court states (p. 2) that "Appellant remained in custody of the State of New York and on *December 15, 1974* [sic] was brought to the United States District Court for the Southern District of New York by a writ of habeas corpus ad prosequendum for the setting of bail, and returned to the State's custody at Riker's Island the same day." (Emphasis in the original). The record is less precise as to whether Edwards was returned to Riker's Island on January 8, 1975, after entry of his guilty plea. His brief in this Court merely states "On *January 8, 1975*, the Appellant was once again produced at the United States Courthouse Foley Square by writ of habeas corpus for plea and arraignment from the State's custody and again returned to the custody of the State of New York at Riker's Island." (Emphasis in the original). This language of course suggests that Edwards was both produced and returned on January 8. In any event, the sanctions of Article IV(e) only apply if "trial is not had on any indictment... prior to the prisoner's being returned to the original place of imprisonment." Since a plea of guilty is the equivalent of a conviction after trial, a return of Edwards to the custody of New York State after entry of a guilty plea neither violates Article IV(e) nor requires imposition of its sanctions.

B. Edwards Was Not "Serving a Term of Imprisonment" At the Time He Was Returned to State Custody and Is Therefore Not Entitled to the Benefits Conferred by Article IV of the Agreement

It appears from the record that on December 18, 1974, when Edwards was returned to Riker's Island after his arraignment and the setting of bail, he was not serving a term of imprisonment, but was being detained at Riker's Island pending disposition of state charges against him. It was not until February 13, 1975, after the entry of his guilty plea on the federal charge, that Edwards was sentenced in state court and began serving a term of imprisonment. It was, therefore, only at that time, if at all, that the provisions of Article IV(e) of the Agreement become applicable to him. Since it cannot be disputed that there was no violation of Article IV(e) by the Government at any time *after* February 13, Edwards' claim under that Article must be rejected.*

This issue was recently decided by the Sixth Circuit in *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977). In that case, the defendant was being held at the Queens

* The record is not entirely clear on the question of whether Edwards was serving a term of imprisonment at Riker's Island prior to February 13, 1975. The entry in the district court docket sheet quoted in appellant's brief, as well as the state practice of lodging prisoners at Riker's Island who are awaiting disposition of their cases, suggest that he was not serving a prison sentence prior to February 13. This conclusion is bolstered by the fact that the federal indictment charged Edwards with committing the bank robbery on or about May 30, 1974 and Edwards' brief in this Court states that he was not arrested by the state authorities until June 28, 1974. Finally, it is of course incumbent upon Edwards to come forward with facts sufficient to establish his right to the protection afforded by the Agreement. *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1969). Having failed to do so, his petition was insufficient and was properly denied.

House of Detention on a pending New York state charge at the time he was brought to the Western District of Michigan for arraignment on the federal charge. He was returned to his original place of confinement without being tried on the federal charge. The Court concluded that the purpose of the Agreement would not be furthered by applying it in the circumstances of that case even though (1) the defendant was given credit for time served against the state sentence that was eventually imposed; and (2) he was actually engaged in a program of rehabilitation at the detention center. In reaching this result, the Court relied on the fact that any rehabilitation program would, of necessity, be dropped at the time the defendant was transferred to a permanent facility. 548 F.2d at 670.

This interpretation is also compelled by the language of Article III of the Agreement, which permits a defendant who "has entered upon a term of imprisonment" and against whom a detainer has been lodged to demand a trial within 180 days. A construction of the Agreement that applied this provision to a defendant who was merely awaiting trial in the sending jurisdiction might disrupt a planned trial or other pretrial proceedings in that jurisdiction.*

Moreover, as noted by the *Roberts* court, "the Uniform Criminal Extradition Act, which was adopted by many jurisdictions prior to promulgation of the Interstate Agreement on Detainers, contains express provisions for transfer for the purpose of criminal proceedings in another state of persons imprisoned while awaiting trial.

* Both Article III and Article IV contain the same phrase, "term of imprisonment," to describe the status of defendants to whom they apply. It is, therefore, appropriate to look to Article III for guidance in interpreting the provisions of Article IV.

See Uniform Criminal Extradition Act §§ 5 and 18." 548 F.2d at 671.

For these reasons, this Court should follow the decision of the Sixth Circuit and conclude that the Agreement does not apply to defendants who, like Edwards, were merely awaiting trial in the sending state.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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A 126

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

—vs.—

EUGENE QUEEN 8/ 1/74
DAVID RAGLAND 8/ 1/75
HAROLD EDWARDS 2/20/75

Docket Entries

<i>Date</i>	<i>Proceedings</i>
6-11-74	Filed indictment.
6-13-74	Deft. Queen: Produced on a Writ (Atty Present) pleads N/G. 10 days for motions. Bail con't as previously fixed by the Magistrate at \$50,000 cash. Deft. remanded in Lieu of bail. Writ satisfied. Deft. Ragland: Produced on Writ (no atty). Court directs a N/G plea be entered. 10 days for motions. Bail con't as previously fixed by the Magistrate at \$50,000 cash. Deft. remanded in Lieu of bail. Writ satisfied. Knapp, J. Assigned to Judge Metzner for all purposes.
6-24-74	EDWARDS—Deft. not present (no atty.) Court directs a plea of Not Guilty to be and Bench Warrant ordered. Referred to METZNER, J.—KNAPP, J.
6-24-74	Bench Warrant Issued
6-28-74	Suppression hearing held as to defendants QUEEN and RAGLAND. Motion to suppress denied.

Docket Entries

- | <i>Date</i> | <i>Proceedings</i> |
|-------------|--|
| | QUEEN and RAGLAND—defts' present with their Attorneys. Both defts' withdraw their plea of not guilty and both plead guilty to count 1. Plea accepted. P.S.I. ordered. Sentence August 1, 1974. Bail conditions as set by the Magistrate are continued. Defendant's remanded in lieu of bail.—Metzner, J. |
| Aug. 1-74 | —EUGENE QUEEN—Filed Judgment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on count ONE (1). Count 2 is dismissed on motion of defendants' counsel with the consent of the Government.—Metzner, J. copies issued. |
| Aug. 1-74 | —DAVID RAGLAND—Filed judgment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SEVEN (7) YEARS on count (1) ONE. Count 2 is dismissed on motion of defendant's counsel with the consent of the Government.—Metzner, J. copies issued. |
| Aug. 7-74 | —EUGENE QUEEN—Filed C.J.A. copy #2 —original copy appointing Allen Stim, Esqs. as Attorney, mailed to A.O., Wash., D.C. for payment. |
| Aug. 15-73 | —QUEEN—Filed letter of deft. with memo endorsed: The attached letter will be treated as a motion to reduce sentence. The motion is denied since the Court is of the opinion |

Docket Entries

<i>Date</i>	<i>Proceedings</i>
	that the earliest date for consideration of parole should not occur until the defendant has served 1/3 of the sentence. The crime involved was robbery of a bank in which a gun was used. So ordered.—Metzner, J. m/n by pro se clerk. England
8- -74	—Filed Transcript of record of proceedings, acted for Def. 8-1-74
8-14-74	—QUEEN—Filed Remand with Marshal's return 6/13/74
8-14-74	—RAGLAND—Filed Remand with Marshal's return 6/13/74
9-16-74	—QUEEN—Filed commitment & entered, Deft delivered to
10- 2-74	—RAGLAND—Filed the following documents received from Mag. Raby, Docket Entry Sheet; Criminal complaint; disposition sheet appointments of counsel; temporary commitment
10-28-74	—EDWARD, HAROLD—Closed Statistically because deft. is a Fugitive
11-12-73	—HAROLD EDWARDS—Filed Affidavit for Habeas Corpus Ad Prosequendum
12-18-74	—The defendant HAROLD EDWARDS with his atty. and the AUSA present. The defendant being produced on a writ of H/C. This matter is adjourned to 1/8/75 at 4:30 P.M. Writ adjourned to 1/8/75. Application to vacate bench warrant granted—METZNER, J.

*Docket Entries**Date Proceedings*

12-18-74—Filed Notice of Readiness for trial

12-20-74—EDWARDS—Filed Affidavit for Writ of Habeas Corpus Ad Prosequendum

Dec. 27-74—Filed writ of habeas corpus to produce deft. HAROLD EDWARDS from Rikers Island on Dec. 23, 1974 to this courthouse. Clerk—Carter, J.

Dec. 27-74—Filed writ of habeas corpus to produce deft. HAROLD EDWARDS from Rikers Island on Dec. 18, 1974 to this courthouse. Writ adj. to Jan. 8, 1975. Metzner, J.

01-08-75—HAROLD EDWARDS—(atty. present)—deft. produced on a w/h/c (AUSA present) withdraws plea of not guilty and pleads GUILTY to count 1. Plea accepted. P.S.R. ordered. Sentence adj. to Feb. 20, 1975.

Writ Adj. to Feb. 20, 1975, Metzner, J.

01-14-75—Filed the following papers received from Mag. Raby's office: docket entry sheet, criminal complaint, indictment warrant, SDNY, disposition sheet and appointment of counsel.

02-20-75—HAROLD EDWARDS—Filed JUDGMENT (atty. Edward Panzer, present)—the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of TEN (10) YEARS on count 1. It is recommended that the Atty. General pursuant to Section 4082 of Title 18, USC, arrange to have this sentence served concurrently with the sen-

*Docket Entries**Date**Proceedings*

tence the deft. is presently serving which sentence was imposed on Feb. 13, 1975, in the New York State Criminal Court, in so far as the time that can be served concurrently can be served. If the Atty. General agrees with this recommendation the balance of this sentence if any, will be served in a Federal Institution to be designated by him. Count TWO (2) is dismissed on motion of the defts. counsel with writ satisfied. Metzner, J. (copies issued)

03-11-75—HAROLD EDWARDS—Filed CJA copy #2 appointing Edward Panzer of 299 Bdwy. as defts. atty. original mailed to AO, Washington, DC.

3-75—H. Edward—Filed commitment & entered return, Deft. delivered copy to Warden of Clinton Correc. Facility at Dannemora, N.Y.

04-03-75—Filed govts. w/h/c as to deft. HAROLD EDWARDS to have him appear on Jan. 8, 1975. Writ satisfied on 2/20/75. Metzner, J.

05-19-75—QUEFN—Filed the following papers recd. from Mag. Raby's Office: docket entry sheet, criminal complaint, SDNY, disposition sheet, appointment of counsel and temporary commitment.

